

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
100 Maryland Avenue, Room 200  
Rockville, Maryland 20850  
(240) 777-6660

IN THE MATTER OF:  
THE OXBRIDGE DEVELOPMENT  
AT ROCK CREEK, LC  
Applicant

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In Support of the Application

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In Support of the Application

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M-NCPPC Technical Staff  
Opposed to the Application

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Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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**I. EXECUTIVE SUMMARY**

|                                  |                                                                                                                                                                                                                                          |
|----------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Applicant:                       | Oxbridge Development at Rock Creek, LC                                                                                                                                                                                                   |
| LMA No. & Date of Filing:        | G-822, filed March 30, 2004                                                                                                                                                                                                              |
| Zoning and Use Sought:           | Zone: R-T 8 Use: 30 Single Family Townhouses                                                                                                                                                                                             |
| Current Zone and Use:            | Zone: R-90 & R-200 Current Use: Forested                                                                                                                                                                                                 |
| Location:                        | West side of Baltimore Road, approximately 1,850 feet south of its intersection with Parkvale Road                                                                                                                                       |
| Applicable Master Plan:          | <i>1994 Aspen Hill Master Plan</i>                                                                                                                                                                                                       |
| Minimum Tract Required:          | 20,000 square feet                                                                                                                                                                                                                       |
| Acreage to be Rezoned:           | Approximately 5.6872 acres (247,735 sq. ft.)                                                                                                                                                                                             |
| Right-of-Way to be dedicated:    | Right-of-way along Baltimore Road – .3695 acres (16,098 sq..ft.)                                                                                                                                                                         |
| Proposed Dedication to Parkland: | 1.53 acres (66,650 square feet)                                                                                                                                                                                                          |
| Density Permitted in R-T 8 Zone: | 8 units per acre = 45 Dwelling Units on 5.6872 acres<br>( 5.6872 acres X 8 = 45.5)                                                                                                                                                       |
| Density Planned:                 | 5.3 units per acre ( <i>i.e.</i> , 30 Dwelling Units on 5.6872 acres)                                                                                                                                                                    |
| Bldg. Coverage Allowed/Planned:  | 35% Maximum (86,707sq.ft.) / 13% planned (32,832 sq.ft.)                                                                                                                                                                                 |
| Green Space Required/Planned:    | 50% Required (123,868 sq.ft.) / 68% planned (169,325 sq.ft.)                                                                                                                                                                             |
| Parking Spaces Required/Planned: | 60 required (2 spaces per unit) / 72 planned (2.4 per unit)                                                                                                                                                                              |
| Building Height Limits:          | 35 feet maximum allowed / 35 feet planned                                                                                                                                                                                                |
| Traffic Issues:                  | Traffic calming measures are sought by the neighbors                                                                                                                                                                                     |
| Storm Water Drainage:            | Storm water management will be provided on site, and plans will be finalized at Site Plan and Subdivision Review                                                                                                                         |
| Environmental Issues:            | Technical Staff opposes this project, in part, because of environmental concerns; Applicant and People's Counsel disagree.                                                                                                               |
| Consistency with Master Plan:    | Project is inconsistent with the zoning recommendation of the Master Plan, but is consistent with certain goals of the Plan                                                                                                              |
| Neighborhood Response:           | Support from adjacent Tikvat Israel Congregation (a part owner of the subject site) and from nearby Ashleigh Woods Homeowner's Association; No Opposition at Hearing; Three opposition letters, including one from the City of Rockville |
| Planning Board Recommends:       | No Position (There was a 2/2 split in the vote.)                                                                                                                                                                                         |
| Technical Staff Recommends:      | Denial                                                                                                                                                                                                                                   |
| Hearing Examiner Recommends:     | Approval                                                                                                                                                                                                                                 |

## II. STATEMENT OF THE CASE

Application No. G-822, filed on March 30, 2004, by Applicant Oxbridge Development at Rock Creek, LC, requests reclassification from the existing R-90 and R-200 Zones (Residential- single family homes) to the R-T 8 Zone (Residential Townhouse, with maximum of 8 units per acre) of 5.6872 acres of land. The subject site (Tax Account Nos. 04-00053428 and 04-00054035) is comprised of all of Parcel N895 and a portion of Parcel N951, and it is located in Aspen Hill, on the west side of Baltimore Road approximately 1,850 feet south of its intersection with Parkvale Road and 1,300 feet north of Twinbrook Parkway, adjoining the City of Rockville corporate limits. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development called “Rock Creek Woods,” with thirty new townhomes,<sup>1</sup> and to dedicate a portion of the property to parkland.

The application was reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) who, in a report dated November 12, 2004 (Exhibit 43), recommended denial of rezoning on grounds that the proposal did not comply with the Purpose Clause of the R-T 8 Zone and was not in conformance with recommendations of the 1994 Aspen Hill Master Plan.<sup>2</sup> The Montgomery County Planning Board (“Planning Board”) considered the application on November 18, 2004 and, with a vote of 2 to 2, was unable to adopt a majority position, as stated in the Board’s Memorandum of November 24, 2004 (Exhibit 44).

A public hearing was convened on December 6, 2004, at which time the Applicant presented evidence and testimony in support of the application. There was no opposition testimony from the community, although three letters in opposition had been filed, two by nearby residents and a third by the City of Rockville. Martin Klauber, the People’s Counsel, participated in the hearing, but did not

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<sup>1</sup> Applicant’s original plan called for 43 townhomes, but based on Technical Staff’s concerns, that number was reduced, first to 34 units and ultimately to a maximum of 30 units. Tr. 199.

<sup>2</sup> The Technical Staff Report is quoted and paraphrased frequently herein.

call any witnesses. He supported the application, as did the adjacent Tikvat Israel Congregation (a part owner of the subject site), which sent a letter in support (Exhibit 55) and produced supporting lay and expert testimony. The nearby Ashleigh Woods Homeowner's Association filed a letter (Exhibit 45) supporting the rezoning and requesting installation of "traffic calming measures" along Baltimore Road. Technical Staff testified at the request of the Hearing Examiner. The hearing was completed on December 6, 2004, and the record was held open until January 18, 2005 at Applicant's request to allow the filing of revised exhibits and additional materials. Applicant filed the revised exhibits and additional materials on January 18, 2005 (Exhibit 62 and subparts), but on January 21, 2005, requested that the record be reopened to receive further revisions (Exhibit 64 and subparts).

By notice dated January 24, 2005, the Hearing Examiner reopened the record to receive Applicant's filings, which included revisions of the SDP (Exhibit 64(b)) and the Declaration of Covenants (Exhibit 64(a)), and to direct Applicant's counsel to obtain an affidavit to fill a gap in the testimony of expert witness, James Crawford, a portion of which the court reporter could not transcribe because of a mechanical failure. The notice also held the record open for ten days thereafter, until February 10, 2005, to receive comments from interested parties. Applicant filed the Crawford affidavit on January 31, 2005, as required (Exhibit 65(a)). On February 4, 2005, Technical Staff commented on Applicant's evidence regarding the environment (Exhibit 66). On February 7, 2005, the Hearing Examiner issued notice that the record would be held open until February 21 to receive comments on Technical Staff's supplemental report and on a clarified SDP sought by the Hearing Examiner. On February 10, 2005, Montgomery County Public Schools filed a new statement (Exhibit 68) correcting erroneous information in its earlier letter (Exhibit 61). On February 14, 2005, Applicant filed a final revised SDP (Exhibit 69(b)) and Declaration of Covenants (Exhibit 69(a)). The record closed on February 21, 2005.

As is evident, this was a close case, given the inability of the Planning Board to reach a

majority position and the conflict between the experts at Technical Staff and the experts who testified for Applicant and the Tikvat Israel Congregation at the hearing. However, evaluating the entire record under a preponderance of the evidence standard, the Hearing Examiner concluded that the weight of the evidence favors the Applicant.

### **III. FINDINGS OF FACT**

#### **A. Subject Property**

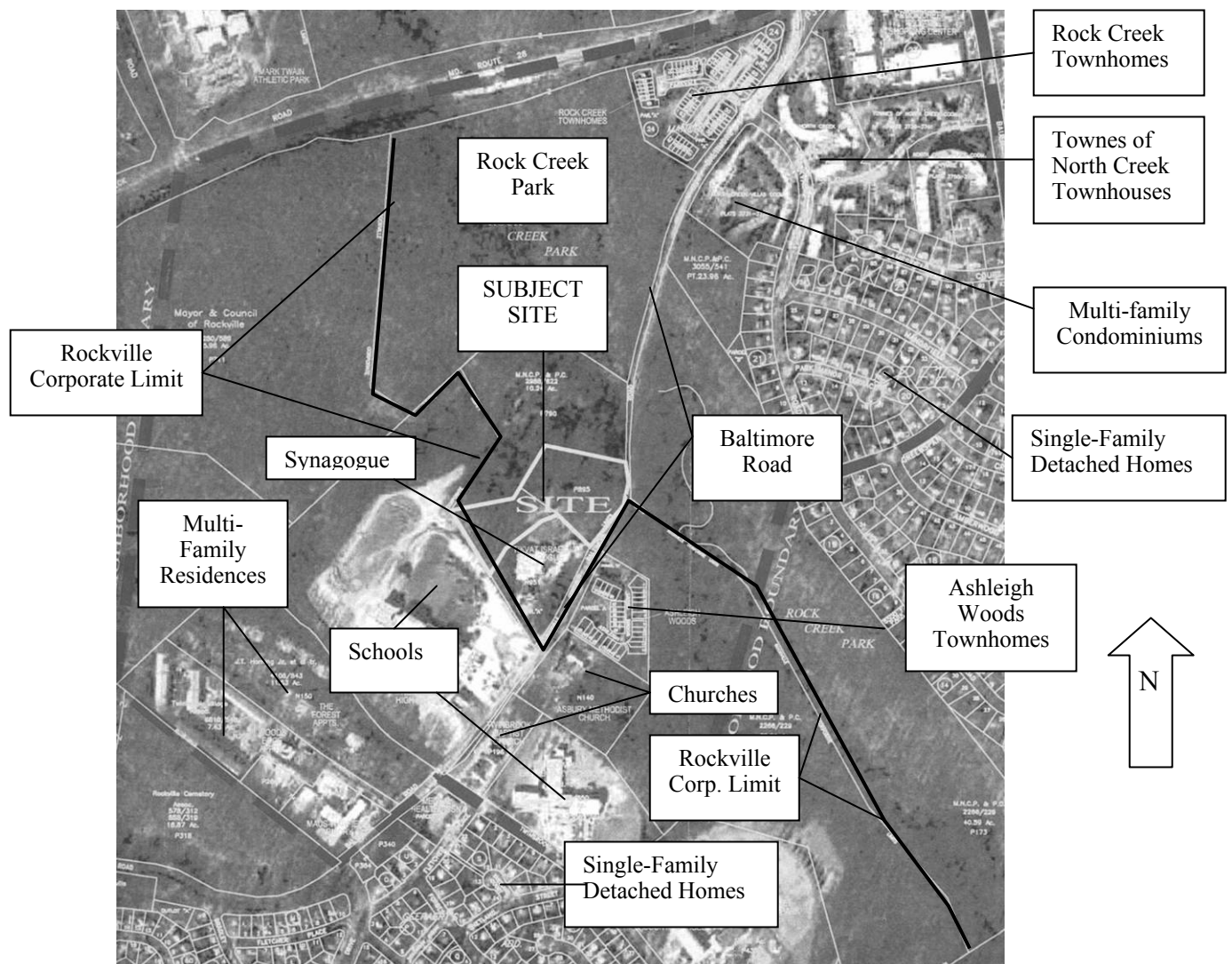
The subject site is located on the west side of Baltimore Road approximately 1,850 feet south of its intersection with Parkvale Road and 1,300 feet north of Twinbrook Parkway, in Aspen Hill, adjoining the City of Rockville corporate limits. Two parcels comprise the subject property, Parcel N895 in its entirety (the Pickett property) and the northwestern portion of Parcel N 951 (the synagogue property). Parcel N895 consists of approximately 3.56 acres of R-90 and R-200 zoned land, and the northwestern portion of Parcel N951 consists of approximately 2.12 acres of R-200 zoned land. The remaining portion of parcel N951 consists of 3.71 acres and is developed with an institutional use, the Tikvat Israel Congregation. The Applicant has contracts to purchase the northwestern half of parcel N951 and all of parcel N895, and if successful in this application, intends to subdivide both parcels into one parcel consisting of 5.68 acres.

The property has approximately 465 feet of frontage on Baltimore Road and a maximum depth of approximately 400 feet. The Pickett property contains a single family house, but most of the property is undeveloped. Access to this dwelling unit is from a gravel driveway that travels through Rock Creek Park and connects to Baltimore Road. Technical Staff describes the Pickett property as mostly forested, “contain[ing] many large mature trees, several specimen trees, outcroppings, and steep slopes along the site’s frontage on Baltimore Road.” Staff also notes that the property slopes up from Baltimore Road at approximately a 25% rate and then flattens out to a gentler slope along its northern and western property lines. Applicant’s revised Land Use Report

(Exhibit 41(b)), describes the topography as follows:

The northeastern corner of the subject property, at Baltimore Road, is . . . the site's lowest point. . . . From Baltimore Road, . . . the site slopes up steeply at approximately 25 percent to a hilltop at an elevation of approximately 350 feet. The hilltop is in the center of the site where the existing house is located. From that point, the site slopes down to the west and north at approximately 5 percent to 13 percent to the western property boundary.

The subject portion of Parcel N951 is undeveloped and, according to Technical Staff, contains gentle slopes, trees and wildlife. The southeastern portion of Parcel N951 is developed with the Tikvat Israel Congregation and associated parking. The City of Rockville's corporate limits zigzag around the southern border of Parcel N951. The following topographic map (Exhibit 6) shows the location of the subject site and some of its surroundings:



## **B. Surrounding Area**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. Technical Staff recommends describing the surrounding area as bounded by Norbeck Road (MD 28) to the north, Bauer Drive, Greenspan Lane, and line through Rock Creek Regional Park to Twinbrook Parkway on the east; Twinbrook Parkway, Shetland Street, Forbes Street, Fletcher Place, Broadwood Drive and the northern property line of Rockville Cemetery on the south; and a line from Rockville Cemetery to the Avery Road and Norbeck Road intersection on the west.

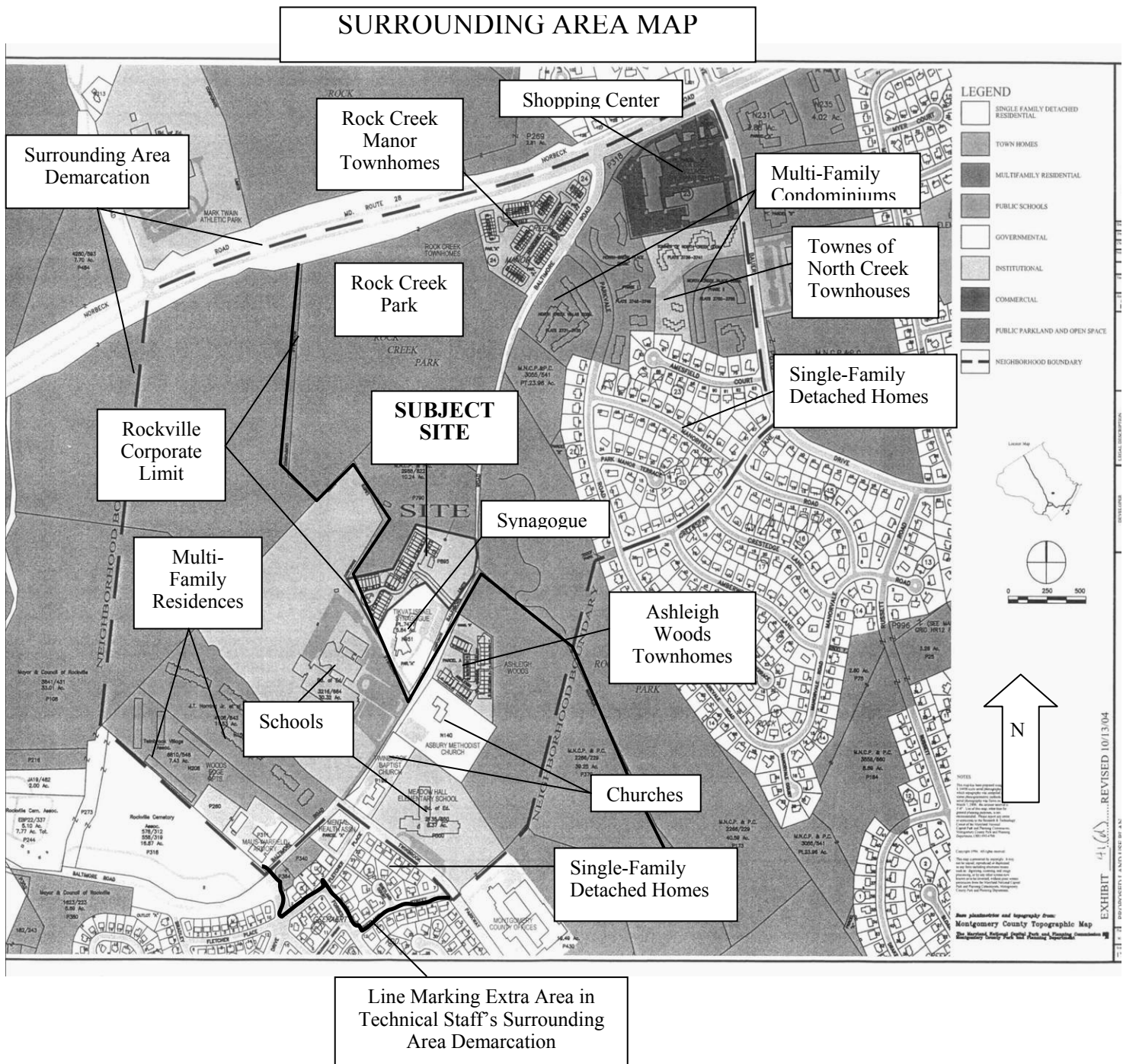
Applicant’s land use expert, James Crawford, proposed describing it almost the same way, the only difference being in the southeast corner, where Mr. Crawford proposed that the southern boundary of the surrounding area be Twinbrook Parkway and Baltimore Road (Tr. 49 and Exhibit 41(d)). Technical Staff went a bit further south, including the area north of Shetland Street, Forbes Street, Fletcher Place and Broadwood Drive.

Both descriptions are shown on the Surrounding Area Map (Exhibit 41(d)) displayed on the following page. The Hearing Examiner accepts Technical Staff’s description because it includes some additional single family homes which may be affected by added traffic along Baltimore Road.

As can be seen on the Surrounding Area Map, the City of Rockville Corporate Limits zigzag around the southern border of the subject site. The property north and east of the subject site is zoned R-90 and R-200 and is developed as Rock Creek Regional Park, which is owned by the Maryland–National Capital Park and Planning Commission (M-NCPPC). Beyond the park and north along Baltimore Road, the properties are developed with the Rock Creek Manor Townhomes,



zoned RT-12.5, the North Creek Villas and North Creek Place Condominiums (multi-family communities, zoned R-20 and R-30), the Rock Creek Village Shopping Center, zoned C-1, the Townes of North Creek townhouses, and single family detached dwelling units, zoned R-90 and located in Rock Creek Manor, west of Bauer Drive.



To the south and abutting the subject site, the property is split zoned R-90 and R-200 and developed with the Tikvat Israel Congregation. The southern property line for the synagogue delineates the corporate limits for the City of Rockville. South of the synagogue, along Baltimore Road and within the City limits, the properties are developed with Rockville High School, multi-family dwelling units (the Forest Park Apartments and the Woodedge Apartments) and an institutional use, the Maus-Warfield Armory.

East of the subject site, and across Baltimore Road, is the Rock Creek Regional Park. The City of Rockville corporate limits are directly south of the park and development along the east side of Baltimore Road includes townhouses (Ashleigh Woods), and institutional uses, the Asbury Methodist Church, the Twinbrook Baptist Church, and the Meadow Hall elementary school.

At the intersection of Twinbrook Parkway and Baltimore Road is the Mental Health Association of Montgomery County, and south of that, city owned open space. Between Twinbrook Parkway and Broadwood Drive the uses include single-family detached dwellings bordering Shetland Street, Forbes Street and Fletcher Place. Uses along the western border of the defined neighborhood include parkland owned by M-NCPPC and land owned by the City of Rockville.

### **C. Zoning History**

The subject property was classified in the R-90 Zone by the 1954 Countywide comprehensive zoning. The R-90 Zone was reaffirmed by the 1958 Countywide comprehensive zoning. The current R-90 and R-200 Zones were approved by SMA-G-709 on July 19, 1994. Exhibit 4(a).<sup>3</sup>

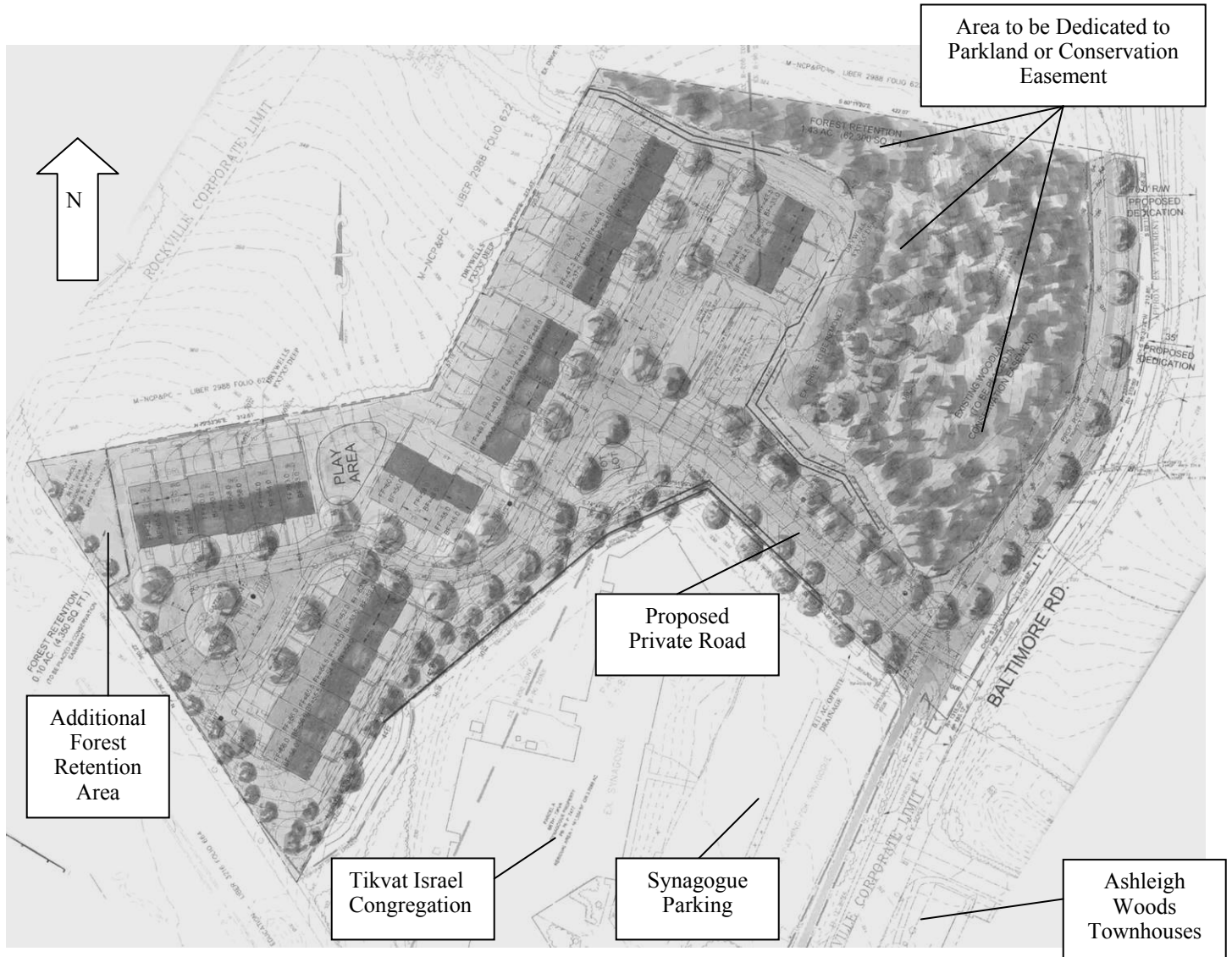
### **D. Proposed Development**

The Applicant seeks to have the subject site reclassified from its current R-90 and R-200 Zones to the R-T 8 Zone so that it can construct a maximum of thirty residential townhouse units, called “Rock Creek Woods” along the western portion of the 5.6872 acre subject site. Applicant

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<sup>3</sup> The Technical Staff report erroneously listed the date of SMA-G-709 as 7/19/04. The correct date is 7/19/94.

has committed to dedicating about 1.5 acres of the eastern portion of the site to parkland<sup>4</sup> (or to a conservation easement, if the Planning Board prefers, as shown in the binding elements of its revised SDP, Exhibit 69(b)). An overview of the project can be seen in the illustrative diagram below, taken from Exhibit 49, the rendered version of the Landscape Plan.



Each of the 30 townhouse units will have a two-car garage, and there will be 12 surface (guest) parking spaces (bringing the total parking to 72 spaces), one tot lot, one play area and a gazebo. Access to the site would be from Baltimore Road via a private roadway. No phasing schedule for construction of the development is proposed. In its revised Land Use Report (Exhibit 41(b)), Applicant states that

<sup>4</sup> A small portion of this forest retention is located in the western corner of the subject site.

the interior units are typically 22 feet wide by 48 feet deep, except for two “sticks” of three units each where interior units are 24 feet wide by 48 feet deep. End units are typically 24 feet wide with depths ranging from 40 feet to 48 feet. Units have front-entry, two-car garages set back a minimum of 18 feet from sidewalks.

Applicant did not plan to include any Moderately Priced Dwelling Units (MPDU’s) because, as noted in the Technical Staff report, the requirement for MPDU’s does not currently apply to developments of fewer than 35 dwelling units. However, on November 30, 2004, after the date of the Technical Staff report, the Council approved Bill No. 24-04/25-04/27-03, which, *inter alia*, amended Montgomery County Code §25A-5(a) to expand the applicability of the MPDU requirements to all residential developments of 20 or more units submitted for approval of a preliminary plan of subdivision. The bill was signed by the County Executive on December 11, 2004, and has an effective date of April 1, 2005. Whether or not this legislation will affect the subject development will depend on when they submit their preliminary plan of subdivision. If it applies, then 4 of the 30 units (*i.e.*, 12.5%) would have to be MPDU’s, pursuant to Montgomery County Code §25A-5(c). Applicant has committed to doing so in its final SDP (Exhibit 69(b)), if the new law applies, but noted that the width of MPDU’s might be 20 feet, instead of 22 or 24 feet planned for market-rate units (Exhibit 62).

Applicant’s “illustrative elevations,” submitted in Exhibit 10, are shown below:



The Land Use Report also indicates that the planned private roadway will be 20 feet wide, with sidewalks and parking areas, and will connect with Baltimore Road at the synagogue property line. The proposed access point is approximately 130 feet north of the entrance to the Ashleigh Woods townhouse community. Applicant notes that the sight distance required by Montgomery County guidelines is 250 feet, and states that, after grading for improvements to Baltimore Road, the sight distance will exceed the guideline.

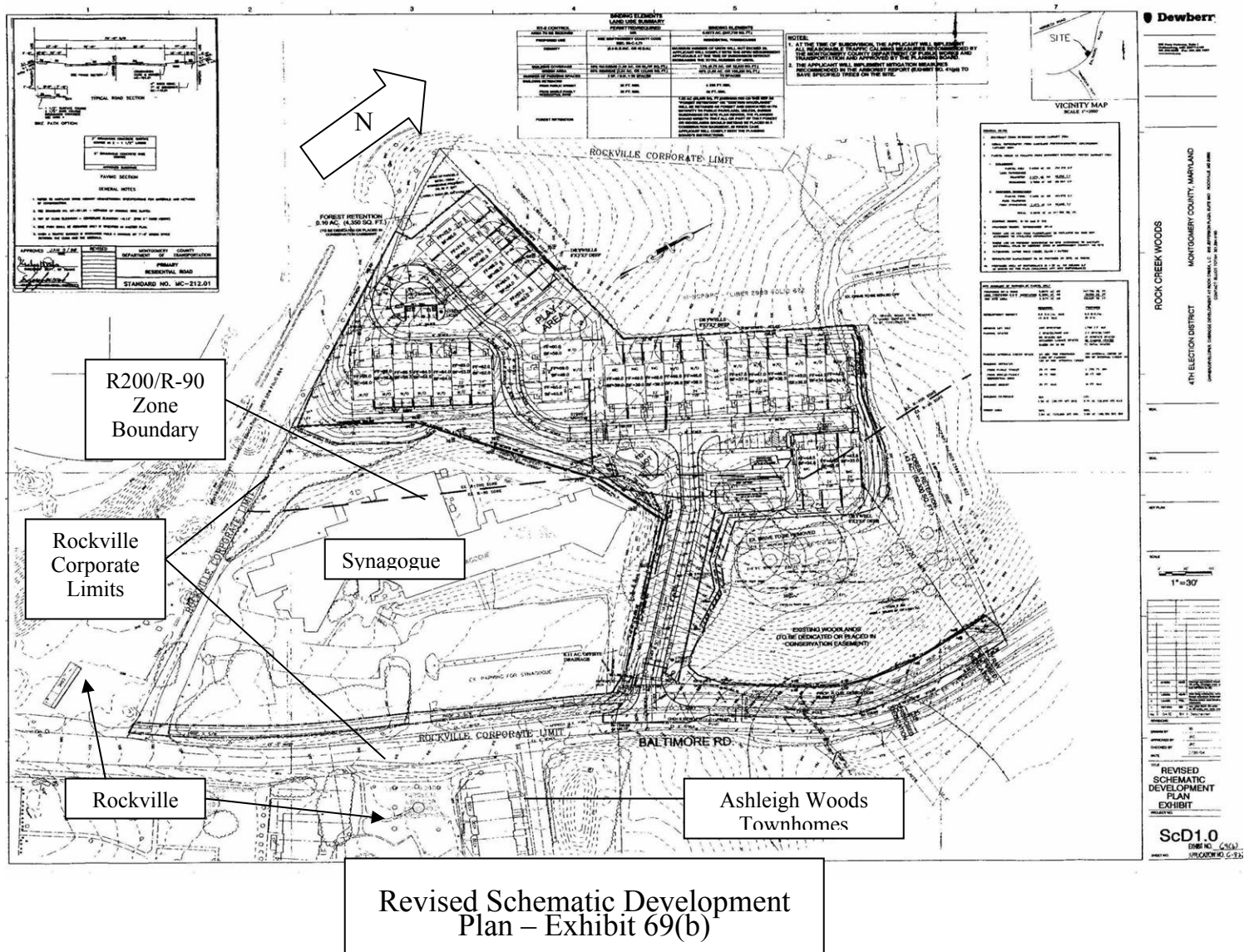
In addition to the forest retention mentioned above, Applicant promises (Exhibit 41(b)) to locate trees along Baltimore Road and along the road serving the site. Landscaping, as shown in Exhibit 41(f)), will be installed along the southwestern property line adjacent to Rockville High School and along the southeastern property line adjacent to the synagogue. A retaining wall and screening fence will be located between the subject site and the synagogue along with a buffer strip of evergreen trees.

Applicant also states in its revised Land Use Report that Baltimore Road will be improved along the subject property's frontage in accordance with the County's Primary Residential Road Standard No. MC-212.01. "Improvements will include widening pavement on the west side of the road to 18 feet from road centerline with curb, gutter, and required storm drainage systems. Grading at a two-percent slope up from the curb and installation of a 5-foot-wide sidewalk is required with a four-percent slope up from the sidewalk through a 10-foot-wide public utilities easement." See, also, Tr. at 63.

Technical Staff notes that additional approval procedures, following rezoning approval, would include the review and approval of a Preliminary Plan of Subdivision, a Site Plan, a Final Forest Conservation Plan and a Final Plat of Subdivision by the Planning Board.

## E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. The revised SDP (Exhibit 69(b)) is shown below:



This reduced copy is, unfortunately, too small to see any details, but more revealing views can be seen on the rendered version of the landscape plan, depicted on page 11 of this report, and in the reproduction, shown below, of the illustrative graphic portion of the revised SDP (Exhibit 69(b)):





In addition to the illustrative graphic on the SDP, there is a section of the SDP labeled “Binding Elements,” and it is shown below:

| <b>BINDING ELEMENTS<br/>LAND USE SUMMARY</b> |                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|----------------------------------------------|----------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>RT-8 CONTROL</b>                          | <b>PERMITTED/REQUIRED</b>                    | <b>BINDING ELEMENTS</b>                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>AREA TO BE REZONED</b>                    | N/A                                          | 5.6872 AC. (247,735 SQ. FT.)                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>PROPOSED USE</b>                          | SEE MONTGOMERY COUNTY CODE<br>SEC. 59-C-1.71 | <b>RESIDENTIAL TOWNHOUSES</b>                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>DENSITY</b>                               | (8.0 D.U./AC. OR 45 D.U.)                    | MAXIMUM NUMBER OF UNITS WILL NOT EXCEED 30. APPLICANT WILL COMPLY WITH THE MPDU REQUIREMENT APPLICABLE AT THE TIME OF SUBDIVISION WITHOUT INCREASING THE TOTAL NUMBER OF UNITS.                                                                                                                                                                                                                                                     |
| <b>BUILDING COVERAGE</b>                     | 35% MAXIMUM (1.99 AC. OR 86,707 SQ. FT.)     | 13% (0.75 AC. OR 32,832 SQ. FT.)                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>GREEN AREA</b>                            | 50% MINIMUM (2.84 AC. OR 123,868 SQ. FT.)    | 68% (3.89 AC. OR 169,325 SQ. FT.)                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>NUMBER OF PARKING SPACES</b>              | 2 SP. / D.U. = 60 SPACES                     | 72 SPACES                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>BUILDING SETBACKS</b>                     |                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| FROM PUBLIC STREET                           | 25 FT. MIN.                                  | ± 220 FT. MIN.                                                                                                                                                                                                                                                                                                                                                                                                                      |
| FROM SINGLE-FAMILY RESIDENTIAL ZONE          | 30 FT. MIN.                                  | 30 FT. MIN.                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>FOREST RETENTION</b>                      |                                              | 1.53 AC (66,650 SQ. FT.) DESIGNATED ON THIS SDP AS "FOREST RETENTION" OR "EXISTING WOODLANDS" WILL BE RETAINED AS FOREST AND DEDICATED IN ITS ENTIRETY TO PUBLIC PARKLAND, UNLESS, DURING SUBDIVISION OR SITE PLAN REVIEW, THE PLANNING BOARD DIRECTS THAT ALL OR PART OF THAT FOREST OR WOODLANDS SHOULD INSTEAD BE PLACED IN A CONSERVATION EASEMENT, IN WHICH CASE APPLICANT WILL COMPLY WITH THE PLANNING BOARD'S INSTRUCTIONS. |

Those elements designated by the Applicant as binding must also be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the required Declaration of Covenants in the administrative record of this case as Exhibit 69(a).

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The SDP’s “Notes,” “General Notes” and “Site Summary of Townhouse Parcel Only” from Exhibit 69(b) are shown below. Some of these items are also included in the binding elements,



while others are subject to revision at subdivision, a process which is contemplated under the optional method:

**NOTES:**

1. **AT THE TIME OF SUBDIVISION, THE APPLICANT WILL IMPLEMENT ALL REASONABLE TRAFFIC CALMING MEASURES RECOMMENDED BY THE MONTGOMERY COUNTY DEPARTMENT OF PUBLIC WORKS AND TRANSPORTATION AND APPROVED BY THE PLANNING BOARD.**
2. **THE APPLICANT WILL IMPLEMENT MITIGATION MEASURES RECOMMENDED IN THE ARBORIST REPORT (EXHIBIT NO. 41(p)) TO SAVE SPECIFIED TREES ON THE SITE.**

**GENERAL NOTES**

1. BOUNDARY FROM DEWBERRY SURVEY JANUARY 2004.
2. AERIAL TOPOGRAPHY FROM MARYLAND PHOTOGRAMMETRIC ENGINEERING JANUARY 2004
3. PARCEL AREAS AS FOLLOWS FROM DEWBERRY BOUNDARY SURVEY JANUARY 2004.
  - A. **SYNAGOGUE**

PARCEL N951: 5.8359 AC. OR 254,210 S.F.  
 LESS TOWNHOUSE  
 TRANSFER: 2.1271 AC. OR 92,656 S.F.  
 REMAINDER: 3.7088 AC. OR 161,554 S.F.
  - B. **PROPOSED TOWNHOUSES**

PARCEL P896: 3.5601 AC. OR 155,079 S.F.  
 PLUS TRANSFER  
 FROM SYNAGOGUE: 2.1271 AC. OR 92,656 S.F.  
  
 TOTAL: 5.6872 AC. or 247,735 SQ. FT.
4. EXISTING ZONING: R-90 and R-200
5. PROPOSED ZONING: TOWNHOUSES: RT-6.
6. THERE ARE NO 100-YEAR FLOODPLAINS OR WETLANDS ON THIS SITE ACCORDING TO AVAILABLE INFORMATION
7. THERE ARE NO HISTORIC RESOURCES ON SITE ACCORDING TO MNCP&PC LOCATIONAL ATLAS OF HISTORIC SITES IN MONTGOMERY COUNTY, MD 1976.
8. WATERSHED: LOWER ROCK CREEK. CLASS 1 WATERS.
9. STORMWATER MANAGEMENT TO BE PROVIDED ON SITE, AS SHOWN.
10. PROPOSED AREA OF DISTURBANCE IS 4.32 Ac. OR 188,000 S.F. AS SHOWN ON THE PLAN (INCLUDING OFF-SITE DISTURBANCE)

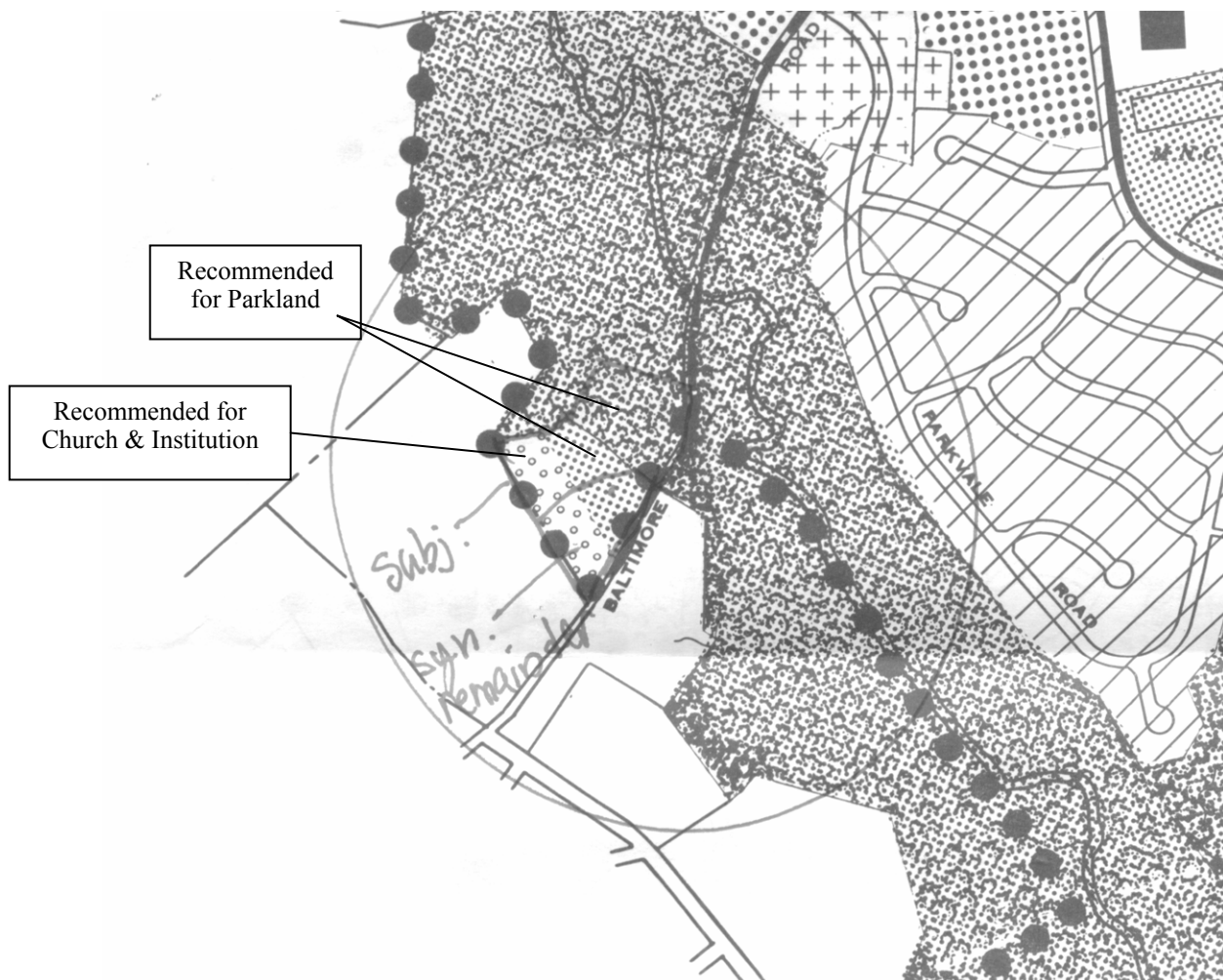
| <u>SITE SUMMARY OF TOWNHOUSE PARCEL ONLY</u> |                                                                                    |                                                                                     |
|----------------------------------------------|------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| PROPOSED RT-8 ZONE                           | 5.6872 AC. OR                                                                      | 247,735 SQ. FT.                                                                     |
| LESS PROPOSED R.O.W. DEDICATION              | 0.3695 AC. OR                                                                      | 16,098 SQ. FT.                                                                      |
| NET SITE AREA                                | 5.3177 AC. OR                                                                      | 231,637 SQ. FT.                                                                     |
|                                              | <u>REQUIRED</u>                                                                    | <u>PROPOSED</u>                                                                     |
| DEVELOPMENT DENSITY                          | 8.0 D.U./Ac. MAX.<br>45 D.U. MAX.                                                  | 5.3 D.U./Ac.;<br>30 D.U.                                                            |
| MINIMUM LOT SIZE                             | NOT SPECIFIED                                                                      | 1,760 S.F. MIN.                                                                     |
| PARKING SPACES                               | 2 SPACES/UNIT MIN.;<br>60 SPACES MIN.<br>INCLUDES GARAGE SPACES<br>BASED ON 30 DU. | 2.4 SPACES/UNIT;<br>12 SURFACE SPACES<br><u>60 GARAGE SPACES</u><br>72 TOTAL SPACES |
| PARKING INTERNAL GREEN SPACE                 | 5% MIN. FOR PROPOSED<br>2,030 SF PARKING;<br>102 SF MIN. INTERNAL GREEN            | 19% INTERNAL GREEN SP.<br>380 SF INTERNAL GREEN SP.                                 |
| BUILDING SETBACKS                            |                                                                                    |                                                                                     |
| FROM PUBLIC STREET                           | 25 FT. MIN.                                                                        | ± 220 FT. MIN.                                                                      |
| FROM SINGLE-FAMILY<br>RESIDENTIAL ZONE       | 30 FT. MIN.                                                                        | 30 FT. MIN.                                                                         |
| BUILDING HEIGHT                              | 35 FT. MAX.                                                                        | 35 FT. MAX.                                                                         |
| BUILDING COVERAGE                            | 35%;<br>1.99 AC. (86,707 SF) MAX.                                                  | 13%;<br>0.75 AC. (32,832 SF) MAX.                                                   |
| GREEN AREA                                   | 50%;<br>2.84 AC. (123,868 SF) MIN.                                                 | 68%;<br>3.89 AC. (169,325 SF) MIN.                                                  |

The Applicant in the present case has proposed binding elements which limit development to a maximum of 30 townhouses, with a building coverage of 13%, 68% green area, 72 parking spaces, a minimum setback of approximately 220 feet from the public street and 30 feet from the adjacent single family residential zone, and dedication to parkland (or a conservation easement, at the Planning Board's discretion) of 1.53 acres of forest retention. In addition to these binding elements, Applicant promises in "Notes" on the SDP to implement reasonable traffic calming

measures at subdivision and to implement mitigation measures recommended in the arborist's report to save specified trees.

## F. Master Plan

The subject property is located at the western edge of the 1994 Aspen Hill Master Plan area. Although there is no specific guidance in the written portion of the Master Plan for this property, the Master Plan's "Land Use Plan" recommends about two thirds of the subject site for parkland (all of the Pickett property and half of the synagogue property) and one third for "Church and Institutional," as shown below in the magnified portion of the Master Plan's Land Use Plan (Exhibit 54), marked by Applicant's land use expert, James Crawford, at the hearing. Tr. 91-94.



Technical Staff summarized its reading of the Master Plan as follows:

Although this property is not listed as one of the significant properties with specific recommendations in the Plan, th[e] fact that the land use map shows this site to be future parkland indicates that the preferred use for this site, from a master plan point of view, is preservation, not higher density than it is currently zoned. The Master Plan does not designate the subject site for residential development at densities allowed in the R-T Zones. Nor does the text of the plan state that residential townhouse development is appropriate at this location. Given the guidance in the master plan and the environmental constraints of the site, staff believes that the subject site is not a suitable location for rezoning to higher densities.

Technical Staff buttresses this interpretation of the Master Plan with references to the following quotes from the Plan:

“Development is to be concentrated in suitable areas.” Page 19

“Encourage and maintain a wide choice of housing types and neighborhoods . . . at appropriate densities and locations.” Page 21

“Environmental and physical conditions are major constraints in determining the developability of a site. This Plan recognizes these factors in its examination of infill development potential.” Page 38

“This Plan supports retention and reconfirmation of existing zoning for all developed, underdeveloped and undeveloped land in the Aspen Hill Planning area, except for those sites recommended for a change by this Plan.” Page 38

In response, the Applicant admits that the subject property, which Applicant characterizes as “a significant developable parcel,” was not recognized as such by the Master Plan. Exhibit 41(b), page 19. Although the Hearing Examiner cannot speculate, as Applicant does (Tr. 51-53), on the reason for this omission, Applicant does properly point to the fact that, on page 181 of the Master Plan, there is a notation that “[t]he Department of Parks has no current plans for additional parkland acquisitions.” The Master Plan also notes that “this does not preclude an investigation of sites when

specifically requested,” but it appears from the evidence in this case that M-NCPPC is not pursuing that option as to the subject site with particular gusto. According to the testimony of Michael Pickett, there were some aborted attempts by M-NCPPC to purchase the property, but an agreement was never reached, apparently because the owners and M-NCPPC could not agree on a price. Tr. 185-187.

Applicant concludes that the Master Plan “mistakenly assumed” the subject property designation should be public parkland. Whether “mistaken” or not, it does appear that the Master Plan did not analyze what kind of development would be most suitable on the subject property, even though the owners presumably have the right to develop on it.

Not surprisingly, Applicant gets a different message from the text of the Master Plan than Technical Staff’s reading. Applicant argues that “Development of housing on the subject property assists in the Master Plan goal [stated at page 21 of the Plan] of encouraging a choice of housing types at appropriate densities and locations. The proposed development, consisting of lower density townhouses in an area of low to medium density, would take advantage of a location convenient to schools, parks, and shopping, thereby enhancing the neighborhood and achieving this housing goal of the Master Plan.” Exhibit 41(b), page 24.

Applicant also points to the Master Plan goal of providing for “attractive land uses that encourage opportunity for social interaction and promote community identity” [Page 22], and notes that “[h]ousing on the subject property will allow future residents opportunities to interact with others at nearby community facilities including schools, religious institutions, athletic facilities, county offices at the former Broome Middle School, recreational facilities such as Rock Creek Park, and the Rock Creek Village Shopping Center. Such interaction is one element in developing community identity and helps to promote the community identity and design goal of the Master Plan.” Exhibit 41(b), page 24.

Finally, Applicant argues that “the Aspen Hill Master Plan directly supports the Land Use Goal and Wedges and Corridors Concept by maintaining residential and supporting commercial uses as the most important uses in the area.” Exhibit 41(b). page 24. According to Applicant, “[r]esidential land use for the subject property is appropriate given its location in an area of low to medium density communities with an abundance of nearby community facilities including schools, institutional uses, recreation, and shopping. Residential land use here promotes the Master Plan’s land use objective through compatibility with neighboring land uses while adding people to use and support nearby facilities.” Exhibit 41(b), pages 24-25, and Tr. 54.

The “bottom line” here is that both sides of this argument are correct. The Aspen Hill Master Plan clearly does not endorse the use of the subject land for townhouses, but its failure to analyze any potential private development of the land makes it a questionable pillar to defeat an otherwise reasonable plan of private development. The M-NCPPC has never acquired the property for parkland, and the Picketts certainly have the right to develop their property. The Master Plan’s Land Use Map should not prevent that, for the Master Plan is a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L..P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the R-T 8 Zone (Zoning Ordinance §§59-C-1.7, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to lack of Master Plan compliance becomes a policy issue more than a legal question. It is, however, a policy question that requires an affirmative vote of 6 members of the Council, pursuant to Zoning Ordinance §59-H-8.2(b), because neither the Master Plan nor the Planning Board recommended reclassification in this case.<sup>5</sup>

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<sup>5</sup> As mentioned in Part I of this report, the Planning Board split 2 to 2, and therefore did not make any recommendation in this case.

The real question is whether the requested type of development, townhouses in the R-T 8 Zone, is an otherwise reasonable plan of private development. To answer that question, we must address all the issues typically raised in a floating zone case – whether the proposed development will meet the general goals of the Master Plan, whether it will be consistent with the purpose and regulations of the proposed zone, whether it will be compatible with the surrounding development and whether it will be in the public interest. *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967).

The Hearing Examiner finds that Applicant is correct in asserting that the development will meet the Master Plan's general goals of encouraging a choice of housing types, providing opportunity for social interaction, promoting community identity and establishing residential uses near community facilities including schools, institutional uses, recreation, and shopping. Whether it meets the Master Plan goal of being an appropriate density and location, which is also a question raised by the Purpose Clause of the R-T 8 Zone, depends largely on the environmental impact analysis, which will be discussed in Part III. I., below.

### **G. Special Regulations and Development Standards of the Zone**

Special regulations for the R-T 8 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated “Intent and Purpose” of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the R-T 8 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of units in a group is eight, and three continuous, attached townhouses is the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

Applicant's illustrative SDP shows that these requirements can be met. The proposed development is comprised of six "sticks" of townhouses, one each of five and seven units, and two each of three and six units. All the groups show the required two-foot variation in their front building lines. The proposed density for the submitted development is approximately 5.3 dwelling units per acre, though a density of 8 dwelling units per acre is permitted in the Zone.

Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T Zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the R-T 8 Zone. The Development Standards for the R-T 8 Zone are spelled out in Zoning Ordinance §59-1.73. As shown in the table below, the proposed development would meet or exceed the applicable development standards for the R-T 8 Zone.

***Development Standards for R-T 8 Zone -- Code §§ 59-C-1.731 - 1.735***

| <b>Development Standards for R-T 8 Zone</b> |                           |                             |
|---------------------------------------------|---------------------------|-----------------------------|
| <b>Standard</b>                             | <b>Permitted/Required</b> | <b>Proposed</b>             |
| Minimum tract area                          | 20,000 sq. ft. (0.46 ac.) | 247,735 sq.ft. (5.6872 ac.) |
| Maximum density                             | 8 units/ acre (42 max)    | 5.3 units/ acre (30 max)    |
| Building setback requirements               |                           |                             |
| - Public street                             | 25 feet                   | ± 220 feet min              |
| - From adjoining lots (Side)                | 10 feet                   | 10 feet                     |
| - From adjoining lots (Rear)                | 20 feet                   | 20 feet                     |
| - From adjacent single family detached      | 30 feet                   | 30 feet min                 |
| Maximum Building Height                     | 35 feet                   | 35 feet max                 |
| Minimum Green Area                          | 50 percent                | 68 percent min              |
| Maximum Building Coverage                   | 35 %                      | 13% max                     |
| Minimum Parking                             | 2 spaces/ unit (60)       | 72 spaces                   |



## **H. Public Facilities**

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and police, fire and health services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the fact that the scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

### 1. Transportation

Under the 2003-05 AGP Policy Element, as of July 1, 2004 subdivision applications are subject to Local Area Transportation Review ("LATR") requirements.<sup>6</sup>

LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and

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<sup>6</sup> The Policy Area Transportation Review (PATR) was eliminated by the Council in the FY 2003-05 Policy Element of the new AGP, effective July 1, 2004, and the PATR will therefore not be considered in this report.

evening peak periods. As of July 1, 2004, however, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips.

Applicant's traffic engineering expert, Edward Papazian, testified that using the LATR guidelines,<sup>7</sup> he did a traffic analysis of the proposed 30-unit development (Exhibit 41(m)) and submitted it to Park and Planning's Transportation Staff. This Transportation Statement demonstrated that the proposed development will result in 14 trips in the morning peak hour, and 25 trips in the evening peak hour, which, Mr. Papazian noted, is well below the 30-trip minimum that generates the need for a traffic impact study. Transportation Staff agreed with this analysis and with Mr. Papazian's conclusion that this small number of trips would result in no measurable impact and would satisfy the requirements of the LATR. Tr. 143-144.

Mr. Papazian also looked into the safety situation with regard to Baltimore Road, including the accident history referenced in the Technical Staff report. In his opinion, this proposed development will do a great deal to enhance traffic and pedestrian safety in the area for a number of reasons. For one thing, the Applicant will be upgrading Baltimore Road, along the site frontage, to the County's standards, which will widen the pavement on the west side of the road to 18 feet from the road centerline, and add curb, gutter and required storm drainage systems. Exhibit 41(b). In addition, pedestrian access and safety will be significantly enhanced through the construction by Applicant of a 5-foot wide sidewalk, which will provide a continuous pedestrian connection from this property to Rockville High School. Moreover, the Applicant is willing to work with the Staff, the County and the community to install appropriate traffic calming measures. Tr. 145.

According to Mr. Papazian, traffic calming measures for Baltimore Road could include such things as "chokers" that would provide for a little bit of an extension from the sidewalk to the roadway, to slow traffic. It could also involve the installation of some small traffic circles, or a

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<sup>7</sup> The Hearing Examiner takes official notice of the Local Area Transportation Review (LATR) Guidelines issued by the Planning Board on July 1, 2004.

speed limit sign that uses radar to read and display each driver's speed as he/she drives by, forcing the driver to look at his/her speed. All these measures, and others, have been used in Montgomery County, and have been accepted by the Department of Transportation. Tr. 145-146. Mr. Papazian noted that appropriate steps will be taken at the time a preliminary plan of subdivision is reviewed to address anything that comes along, but his findings are that there will be no measurable impact on traffic, and pedestrian and vehicular safety will be enhanced by the proposed development. Tr. 146.

Applicant has agreed to the recommendations of Transportation Staff and to take the traffic calming measures sought by the neighbors. Transportation Staff recommended approval of the requested local map amendment, and the Hearing Examiner finds that Applicant meets the LATR and has satisfied any concerns about traffic safety.

## 2. Utilities

Technical Staff stated in its report that water and service categories are W-1 and S-1, respectively, and that local service is deemed adequate. See Staff Report at 4. James Crawford, Applicant's expert in zoning and land planning, testified that the property is served by adequate public facilities. Water and sewer services are available to the property; telephone and electricity are nearby. Police and fire stations are within reasonable distances to service the proposed community. Both a church and a temple are within walking distance. Tr. 81-82. In Mr. Crawford's opinion, the proposed development would be a "walkable" community, enabling residents to avoid car trips for a number of services. Tr. 83.

Technical Staff criticizes the fact that 10-foot Public Utility Easements (PUE's) are shown in the back yards of the townhouses because such PUE's would restrict the use of these rear yards by the future homeowners; however, Technical Staff notes that this is a site plan issue, not a zoning issue. The Planning Board can require a change at site plan review if it deems appropriate, since the diagram on the Schematic Development Plan is illustrative, not binding.

### 3. Schools

Mr. Crawford testified that there is available capacity in high school, middle school and elementary school in the Rockville cluster, and the high school and elementary school are within walking distance of the proposed development. Tr. 81-83. This assertion is supported by the February 10, 2005 letter of Joseph J. Lavorgna, the Director of Planning and Capital Programming for the Montgomery County Public Schools (Exhibit 68).<sup>8</sup>

Mr. Lavorgna stated in his letter that the subject property is located within the Meadow Hall Elementary, Earle B. Wood Middle School and Rockville High School service areas. Based upon average yield factors for comparable housing units, the impact of this project was estimated by Mr. Lavorgna to be approximately 6 elementary, 3 middle, and 4 high school students. According to Mr. Lavorgna's letter, enrollment at these three schools "is projected to be within capacity for the entire forecast period."

Mr. Lavorgna also notes that the "current Annual Growth Policy (AGP) schools test finds capacity adequate in the Rockville cluster."

### **I. Environment**

The thorniest factual issue in this case involves the possible impact on the environment from the proposed development. Although Technical Staff based its negative recommendation in this case mostly upon its conclusion that the subject site was neither designated for the R-T Zone by the Master Plan, nor transitional as described in the Purpose Clause of the Zone, Staff also expressed its concern about the appropriateness of the proposed development from an environmental perspective. Technical Staff listed eight environmental concerns, to which Applicant's ecology expert, James Morris of Ecotone, Inc., responded, point by point in Exhibit 60. That exhibit is set forth, in its entirety, below (Tr. 166):

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<sup>8</sup> Mr. Lavorgna's initial letter of December 22, 2004 (Exhibit 61), erroneously indicated that the development would be in a different cluster (the Twinbrook Elementary, Julius West Middle School and Richard Montgomery High School service areas), but upon inquiry from the Hearing Examiner, Mr. Lavorgna sent a correcting letter on February 10, 2005.

**Rock Creek Woods: Local Map Amendment Application No. G-822****RESPONSE TO STAFF'S ENVIRONMENTAL ISSUES  
(by James Morris, Ecotone, Inc.)**

**Summary:** In my professional opinion, the proposed townhouse use of the site would result in less environmental impacts than a single-family development of the site, which is permitted by right under existing zoning. Furthermore, the specific environmental concerns raised by staff are better addressed by the proposed townhouse use than a single-family development, which requires a public road involving more grading and retaining walls.

- 1) **Issue:** The proposed area of disturbance (5.33 acres) is considerable.

**Response:** This is incorrect. The area of disturbance for the proposed townhouse development is 4.32 acres, less than 50% of the site. The area of disturbance for a single-family development, which is permitted by right, is greater.

- 2) **Issue:** There will be a permanent loss of priority forest.

**Response:** The proposed townhouse community use would result in less loss of forest than would result from a single-family development under the current zoning.

- 3) **Issue:** There will be disturbance of critical root zones of significant specimen trees located on adjacent parkland.

**Response:** Based upon the level of disturbances within the critical root zones of these off-site trees (a total of 5), it is reasonable to expect that these trees would all survive, and impact minimization and mitigation efforts to be employed during the detailed site design would further improve their survivability.

- 4) **Issue:** There will be impact to a stream valley buffer.

**Response:** The only impact to the stream valley buffer proposed is associated with the required improvements along Baltimore Road, which would be required under either the townhouse or single-family house development scenario.

- 5) **Issue:** There will be impact to shallow soils with patches of exposed bedrock, associated with steep slopes.

**Response:** The proposed townhouse use would result in less disturbance to these areas than development under the current zoning. Impacts to these areas (limited to the eastern portion of the site) have been minimized, and are limited to access road and utility connections, which would be required for any development of the site.

- 6) **Issue:** There is potential for wind-throw of 'saved' trees within the Category 1 conservation easement following site development.

**Response:** We have seen no evidence that this is a concern uniquely or significantly relevant to this site. However, because the proposed townhouse use would result in less forest clearing than development of the site under existing zoning, the townhouse use would better address this concern by providing a larger contiguous retained forest area.

- 7) **Issue:** There will be moderate to severe erosion hazard and severe limitations to site development.

**Response: This is a general observation regarding site constraints and is not particular to the proposed townhouse use. Because the proposed townhouse use would result in less disturbance than the single-family development under existing zoning, the townhouse use would better address this concern.**

8) **Issue:** There is potential for increased sheet flow from the property on to Baltimore Road.

**Response: The proposed development provides for storm drain improvements which will directly convey runoff from the site to the eastern (downstream) side of Baltimore Road, thus eliminating significantly the existing sheet flow issue.**

Mr. Morris also elaborated on these environmental issues in his testimony. In Mr. Morris's opinion, even though all the woodlands are designated as high priority forest, "it's not an exceptional resource," but it is "a very nice resource," the better portion being on the east, on the Pickett side of the site, as opposed to western portions. Mr. Morris opined that the revised Preliminary Forest Conservation Plan ( PFCP, Exhibit 41(h)) is in compliance with the statute, and he noted that Technical Staff also so found. If this property were developed in the R-T 8 Zone with this configuration, the PFCP, in his opinion, would meet all of the forest conservation requirements of the County, and a final FCP would be required concurrent with the detailed site plan, at a later point in the process. Tr. 164.

As is evident from Exhibit 60, Mr. Morris also did a comparison of the environmental impact of the proposed RT-8 zoning with possible development of the site under the current zone, which calls for detached single-family homes. He testified that the 4.32 acres of disturbance he referenced in Item #1 of Exhibit 60 covered the entire area of disturbance for the proposed townhouse development, including both on-site and off-site disturbances, such as clearing for the road and sidewalk. Tr. 167.

The second assertion by Technical Staff was that there would be a permanent loss of priority forest. Mr. Morris responded, saying that even the forest designated "priority" was not an "unusually significant resource," and that more disturbance to that forest area would occur if it were developed as single-family homes under the current residential zone, as the owners have a right to do. Tr. 167-168.

Item 3 raised by Technical Staff was that the planned development would disturb the critical root zone of significant specimen trees located in the adjacent park land to the northwest of the townhouses. In Mr. Morris's opinion, after consultation with an arborist, the five trees in question would not necessarily be lost, especially if proper mitigation techniques were used. "There's every reason to think that all those would survive." Tr. 168. This point was confirmed by Applicant's arborist, Edward P. Milhous, who analyzed each of the trees on the site to determine their health and likelihood of surviving the planned project. That analysis is contained in Exhibit 41(p), dated October 14, 2004.

Mr. Milhous explained that of the four or five trees near the northwest border of the site, only one of them will have grading take place anywhere close to it, and that tree is going to lose less than 25 percent of its root system. In his opinion, Maryland is extra conservative on its designation of what is a critical root zone. There are also special measures that can be taken during grading and construction, to protect trees that are somewhat impacted. "You can apply compost to root systems. You can root prune the root systems to avoid excessive damage. You can mulch the trees. There are various things that can be done."<sup>9</sup> Tr. 178-179.

The fourth issue was that the development would impact the stream valley buffer. According to Mr. Morris, the only stream valley buffer that occurs on this site is stretched across Baltimore Road, and water that currently runs down off of the slope doesn't even enter this stream. He opined that it does not protect the stream resource, "so it's sort of a functionally dead stream buffer. . . ." Moreover, the only impacts of this kind result from required improvements to Baltimore Road, not from development of the site. Tr. 169.

The sixth item in question is the possibility of "wind throw" upon remaining trees. Mr. Morris indicated that wind throw occurs when high gusts or strong wind conditions uproot unprotected trees. In his opinion, that concern becomes more relevant in a development "when you create edge, and

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<sup>9</sup> Applicant put a note on its revised SDP (Exhibit 69(b)), promising to implement these mitigation measures, as described in Exhibit 41(p).

there's new potential for stress on one side of an exposed tree, but . . . we've seen nothing that indicates that there's an unusual situation on this site that makes it more or less possible than any other development area where you've cleared forest." The arborist, Edward Milhous, added that "wind throw" depends on many factors, including weakening of the root systems and removal of nearby trees which tend to support each other; however, it is very difficult to predict. Tr. 180-182. In his opinion, "If the site is to be developed, the townhouse scenario is certainly superior to the single family residential as far as tree preservation goes." Tr. 176 and 183. "You would lose four or five additional trees" if the property were developed as single family homes. Tr. 177.

Mr. Milhous further explained that, on this site, there were 33 trees that he looked at, and "of the 33, 25 were desirable or marginal, and . . . of those[,] 18 had fair/good chance to a good chance of surviving the construction process." He also opined that the chance of surviving might be improved at the site plan stage through various agricultural techniques.

As to items 7 and 8, which involved the potential for sheets of water flowing down the hill, Mr. Morris testified that part of what Applicant is doing will convey all of that water underneath of Baltimore Road. Michael Snyder, a civil engineer, testified that his firm prepared a formal storm water management concept plan, which was approved by the Department of Permitting Services (DPS) on November 12, 2004 (Exhibit 57). Mr. Snyder indicated that, under the plan, storm water from the development portion of the property will be collected in a series of inlets on the upper portion of the site, where the townhouses are proposed, and piped to two separate "sanitrappers" to treat the water quality from the runoff. After the water is treated, the runoff will go into an underground storm water facility, which will consist of roughly 300 feet of large metal pipe that's buried underground, to provide storage for excessive storm water runoff. At the bottom of the hill, at the site's entrance, there will also be two inlets to collect water that runs downhill. This will, once again, be treated for water quality with a large pre-cast facility, which separates oils and sands and other pollutants and releases



the clean water. This system will tie into an existing storm drain system in Baltimore Road that collects water from the synagogue, and a limited amount of water from the road, and discharges it into an existing channel, which flows into Rock Creek. Tr. 131-133.

According to Mr. Snyder, the planned system, which will have a series of inlets and pipes, differs from how the property currently drains. Currently, there is no storm drain system in Baltimore Road, and during large storms, a significant amount of water runs off the hill, sheets across Baltimore Road, and causes a hazardous situation, particularly in ice and possibly siltation. There is presently nothing that would prevent the water runoff from flowing across the street. Mr. Snyder testified that, as part of the development improvements, Applicant will provide another lane of traffic along the frontage of the property, with curb and gutter. The lane will be constructed so that the water will flow from the roadway into the gutter, and that gutter will intercept the water that is coming off of the silt, which will alleviate, or certainly minimize, any water that runs across the road. Tr. 133-134.

In Mr. Snyder's opinion, both from an operational point of view, for the road, and also from a storm water management safety point of view, what is being proposed will be a better situation than what exists there today. Although the development will increase the imperviousness and will thus create more runoff, Applicant will provide storage in the upper regions of the property to temporarily store that excessive runoff before it comes down the hill. Tr. 134. He testified that the system would be sufficient to more than compensate for the added imperviousness. Water runoff from all developed portions of the site will flow into the storm drain system, and improvements in the roadway will alleviate water runoff from the undeveloped portion, which is being preserved as woodlands. Tr. 135-136.

Considering all these factors, Mr. Morris testified that this property is suitable for the development from a ecological and environmental standpoint, "especially as opposed to the single family use." In his opinion, the Applicant's proposal would have less of an impact on the

The differing impact of the proposed townhouse development and a possible single-family detached development was also illustrated by Applicant's experts in Exhibits 50 and 51. Exhibit 50, below, shows a possible development with five single-family homes and a public access road.

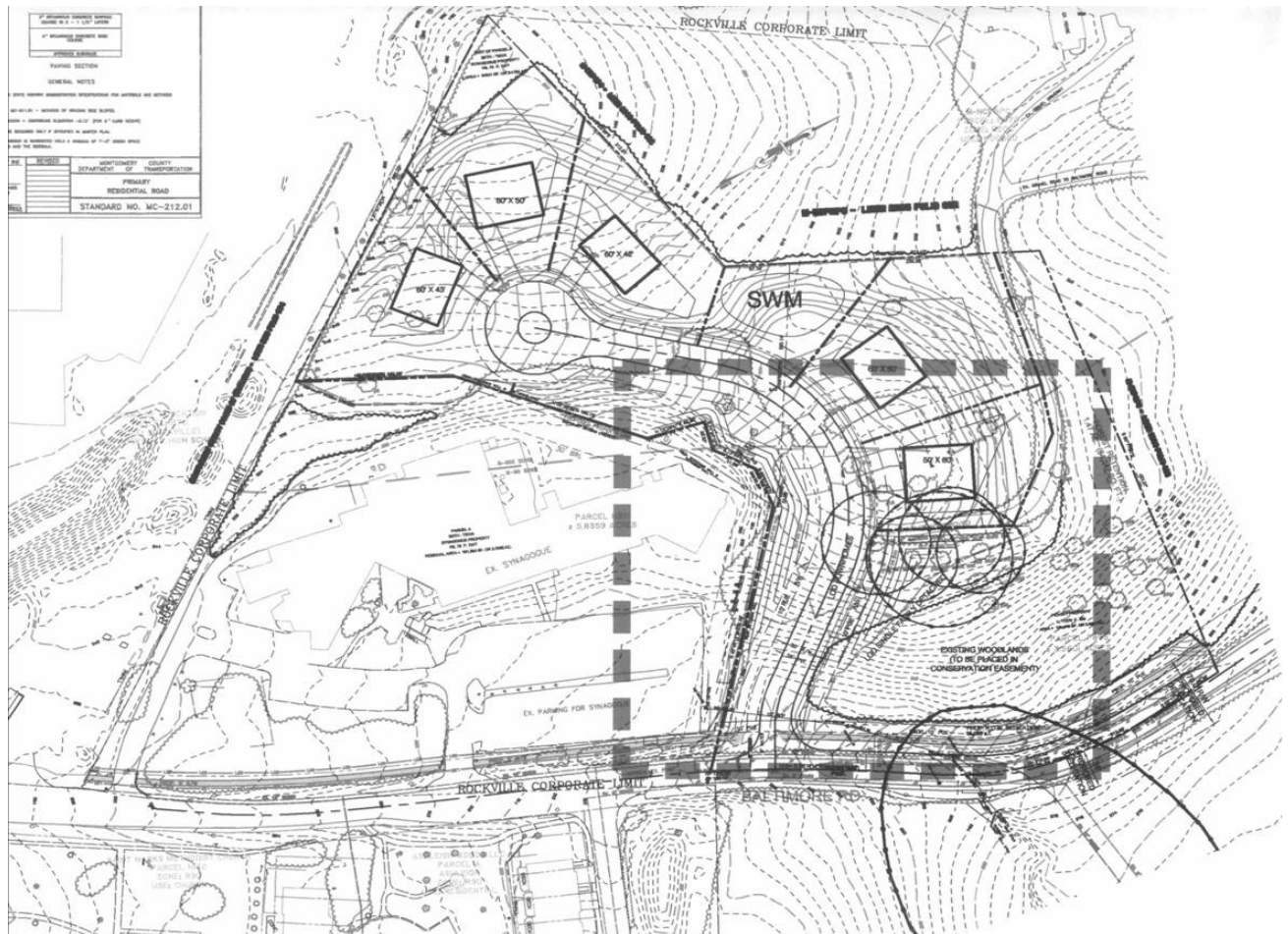
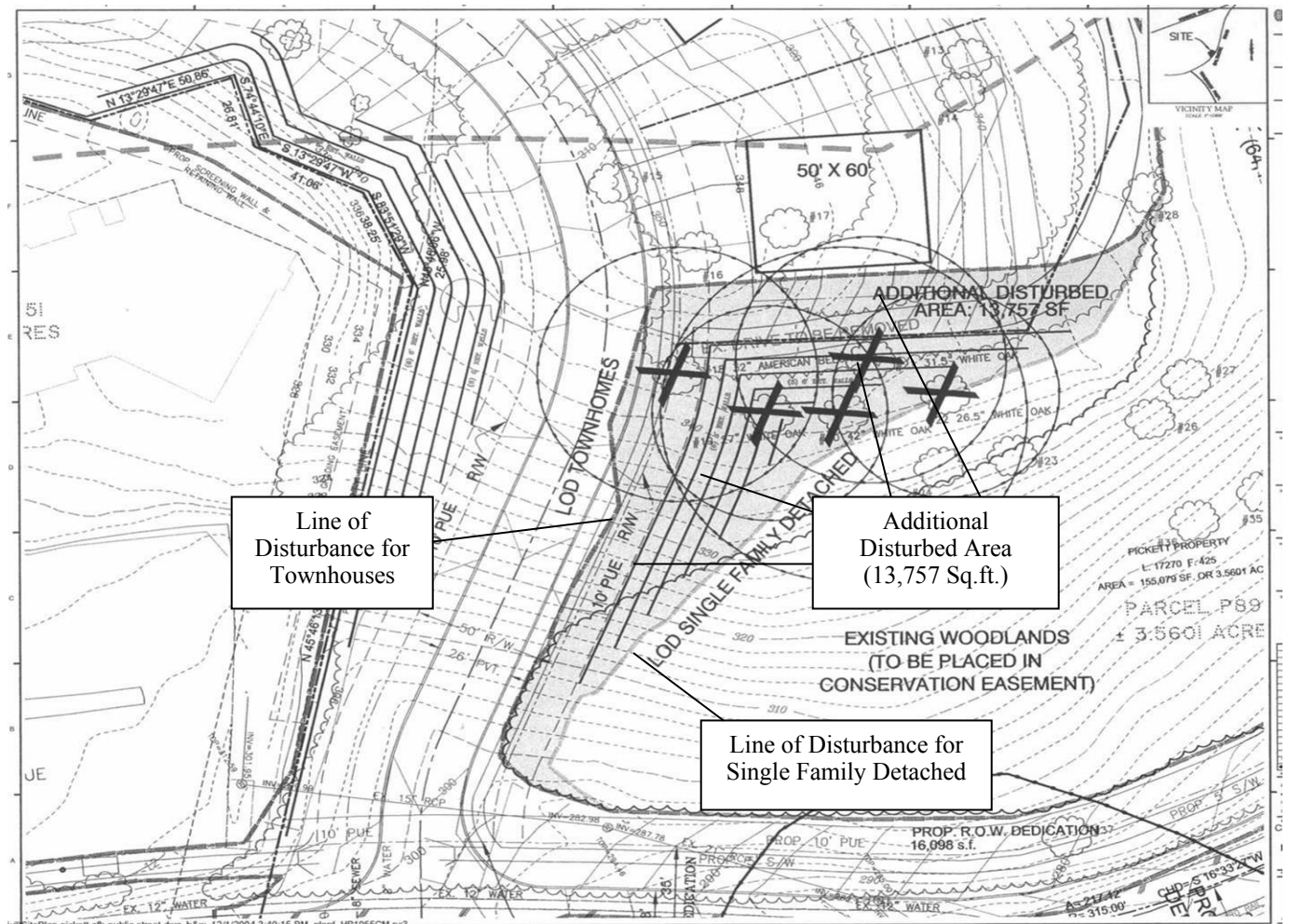


Exhibit 51 is a blowup of the highlighted portion of Exhibit 50, showing the extra area near the access road which would have to be graded (labeled “Additional Disturbed Area”) because of the additional specifications which must be satisfied for a public road. A public road would be required because Zoning Ordinance §59-C-1.322 specifies that lots in the R-90 and R-200 (single-family detached) Zone must have 25 feet of frontage at an existing or proposed street line. As testified by Applicant’s zoning expert, James Crawford (Tr. 65), there is no corresponding frontage

requirement in the RT-8 (townhouse) Zone, and therefore Applicant may use a private access road, which does not have to meet the same standards as a public road. As a result, less grading would be required.<sup>10</sup> The “X’s” on Exhibit 51, below, represent trees which would have to be removed for the single-family development, but not for the townhouse development.



<sup>10</sup> According to Mr. Crawford, DPW&T standards require a 2 percent landing grade, starting at the intersection with Baltimore Road. The 2 percent landing grade, under these DPW&T standards, needs to extend approximately 140 feet. Then, the upper part of the road can reach a maximum of 14 percent grade. This is a very steep site, and it has to be 14 percent grade, but before you can begin grading at 14 percent, DPW&T has a standard for a vertical curve, which extends 220 feet beyond the 140 feet for the landing grade. Referring back to Exhibit 51, that results in a cut of about 36 feet. As stated by Mr. Crawford, it is a massive amount of grading to get down to a point 36 feet lower than it is now, which is required for a public street. Mr. Crawford testified that this additional grading would result in 13,757 additional square feet of land disturbance in the most critical area of this environmentally sensitive portion of the site. Tr. 72. This area has five specimen trees. In addition to the trees, about a third of an acre, would be disturbed. Mr. Crawford contrasted this result with the grading needed for a private street in the proposed townhouse development. In the case of a private street, you would have a landing grade, but not the 140 feet of the landing grade required for a public street. You would have a small vertical curve, and then the road would be graded up at 15 percent. In doing that, there would be approximately 12 to 14 feet cut, not 36 feet. Thus, townhouses would be much more environmentally sensitive to the site than a single-family development.

Thus, Applicant argues that their proposal would disturb the environment much less than the alternative of a single-family detached development, which the owners would have a right to develop under the current residential zones. Martin Klauber, the People's Counsel, argues that the comparison is unnecessary because the zoning law does not require the best possible proposed development; only one that comports with the statutes and is compatible.

The Hearing Examiner nevertheless asked Technical Staff to evaluate Applicant's evidence that its proposal would cause less environmental harm than the alternative single-family detached development. Technical Staff responded on February 4, 2005, with a memorandum (Exhibit 66) to the Hearing Examiner which concluded that there was insufficient information for them to render an opinion on the relative merits, environmentally, of the illustrated single-family detached development versus the proposed townhouse development. Staff noted that it continues to feel that a 30 unit townhouse development at the subject site is "inappropriate" at the densities proposed and inconsistent with the Master Plan; however, they suggest the possibility of an all-townhouse development on the subject site using either the R-90 "cluster standards" or the "MPDU option."

Thus, it is clear that Technical Staff does not consider an all-townhouse development at the site to be inappropriate, *per se*, but rather they reject the current proposal because of the proposed density and the fact that the Master Plan does not call for the R-T 8 Zone at this site. Nevertheless, the Hearing Examiner must decide the environmental portion of the appropriateness issue on the record before him, based on the preponderance of the evidence. He cannot speculate on whether there are styles of single-family detached developments other than the particular one Applicant chose to illustrate in its comparison that might have compared more favorably with Applicant's proposed townhouse development from an environmental impact standpoint. Based on the evidence of record, the Hearing Examiner finds that the proposed townhouse development would be

less intrusive on the environment than the single-family detached development illustrated at the hearing.

As mentioned, the People's Counsel would consider this comparison irrelevant. The Hearing Examiner finds that it does bear on the application of the word "appropriate" in the purpose clause of the R-T 8 Zone, because Technical Staff has opined that the proposed townhouse development would be inappropriate given its environmental effects. If a single-family detached development, which would be permitted as a matter of right in the current R-90/200 Zones, would be less appropriate environmentally than the proposed townhouse development, then that fact undermines Technical Staff's interpretation of the word "appropriate."

Even without reference to the comparison generated by Applicant, the Hearing Examiner must take into consideration that the site is not located in a Special Protection Area, that there are no wetlands on the property, that the storm water management concept plan was approved by the Department of Permitting Services (DPS) and that, by Technical Staff's own admission, "[t]he proposed development meets the technical requirements of the Forest Conservation Law."

Technical Staff report (Exhibit 43), at page 10. Considering all the evidence, including these factors and the responses of Applicant's experts to the concerns raised by Technical Staff, the Hearing Examiner cannot find the proposed development to be inappropriate based on its environmental impact.

## **J. Community Concerns**

Community support for this rezoning application consisted of strong testimonial support from the neighboring synagogue, which has a financial interest in the outcome because part of the subject site is on their property, favorable oral argument from the People's Counsel at the hearing and written support from the nearby Ashleigh Woods Homeowner's Association (Exhibit 45). Opposition from the community consists entirely of three letters, one from the City of Rockville

(appended to the Technical Staff report, Exhibit 43) and two from individual neighbors (Michelle and Donna Wenzel (Exhibit 38), and Janise Brose (Exhibit 33)). Since no opposition witnesses from the community appeared at the hearing, the only opposing testimony came from Technical Staff, who were invited by the Hearing Examiner.

**In Favor:**

1. The People's Counsel:

Martin Klauber, the People's Counsel, did not call any witnesses, but he was a major participant in the hearing. He took a strong position that the Application satisfies the R-T Zone's Purpose Clause because the subject site is "appropriate for residential development at densities allowed in the R-T Zones." In Mr. Klauber's opinion, one need not consider whether it also satisfies the "transition" criterion (*i.e.*, whether "there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.") Tr. 214-218. The People's Counsel also argued that "the basic question of this zoning case, like all zoning cases before the County Council is not what the best and highest use of a property is . . . The basic question in this zoning case, as in all zoning cases, is whether this application satisfies the requirements of the zoning ordinance." Tr. 218-219

Mr. Klauber asserted that "the R-T 8 Zone, under the schematic development plan, affords a type of development that is in the public interest," because it provides certain benefits to an "environmentally sensitive site." The People's Counsel concluded, "I do support the granting of this application under the first clause of the purpose clause of the R-T Zone . . ." Tr. 219

2. Tikvat Israel Congregation:

Tikvat Israel Congregation owns a portion of the property comprising the subject site. The synagogue's Board of Directors and its congregation approved sale of a portion of the synagogue's land to Applicant in August 2003 because the land in question was not usable for

building or parking due to the topography. Security for the synagogue was another motivating factor, especially regarding the possibility of terrorism. A professional security audit in early 2002 concluded that the wooded area behind the synagogue was a source of potentially serious concern, and the Board felt that a townhouse community in place instead of the undeveloped wooded area would improve security. The synagogue also welcomed the proposal because it could provide housing for potential members of the congregation who prefer to walk to their synagogue. Finally, the synagogue appreciated getting some financial value out of the land which was otherwise unusable. The sale of the land is contingent upon approval of the rezoning request. Tr. 103-111.

The synagogue hired a land planning expert, Alfred Blumberg, who testified at the hearing. In Mr. Blumberg's opinion, the application would meet the purposes of the R-T Zone because it is "appropriate for residential development at densities allowed in the R-T Zone," based upon the surrounding land uses (*i.e.*, the high school, the townhouses immediately across Baltimore Road from the property, the adjoining park and other institutional uses). Tr. 116-117. In his opinion, it is to the advantage of the County and the residents to provide housing opportunities in close proximity to the parks.

Mr. Blumberg noted that, on page 8 of the Technical Staff Report in the present case, Technical Staff agreed that the proposed development may be compatible, in terms of uses and densities, with nearby townhouse developments. He concluded that Technical Staff "found some environmental issues that concerned them," but as far as the compatibility of the uses, "they did find it to be appropriate and compatible." In Mr. Blumberg's opinion, because this is a floating zone case, compatibility "is a primary issue." Tr. 120-121.

Mr. Blumberg based his conclusion that the proposed development satisfied the R-T Zone's Purpose Clause solely on the provision stating that the zone may be applied where it is "appropriate." Tr. 123.

3. Ashleigh Woods Homeowner's Association:

Ashleigh Woods Homeowner's Association did not appear at the hearing. Instead, it sent a letter (Exhibit 45) supporting the proposed townhouses, but also asking for the installation of "traffic calming devices." Applicant has agreed to do so, consistent with Planning Board and Department of Public Works and Transportation specifications.

**Opposed:**

1. City of Rockville:

The City of Rockville also did not appear at the hearing, but instead sent a letter of opposition to Chairman Derick Berlage of the Montgomery County Planning Board. That October 29, 2004, letter, which is attached to the Technical Staff report, opposes the rezoning application because "[t]he City of Rockville is opposed to the determination that residential townhouse development is an acceptable land use adjacent to a park." Exhibit 43, Appendix 1.

The Hearing Examiner notes that the Ashleigh Woods Townhouse development, across the street from the subject site, is in the City of Rockville, and was approved for townhouse development even though it abuts the same parkland which is adjacent to the subject site. The letter explains this apparent discrepancy in Rockville's position on the issue by noting that Rockville's Zoning Ordinance was amended subsequently to prevent townhouse development as a transitional use adjacent to parkland.

The City of Rockville also expressed its concern about environmental issues, and it recommended lower density single-family or institutional development if the County elects not to acquire the subject property for parkland.



Also attached to the Technical Staff report is a July 23, 1992, Memorandum of Understanding (MOU) executed by the City of Rockville, the City of Gaithersburg and Montgomery County. Paragraph numbered 5 of that MOU promises that “Changes in land uses, staging, or zoning proposals for parcels with the urban growth areas<sup>11</sup> will only be undertaken after the participation and consultation of the other parties.” The MOU does not spell out what constitutes “participation and consultation,” but the City of Rockville certainly had a right to participate in the hearing and chose not to do so.

The arguments raised by the City of Rockville (*i.e.*, transition, environment and Master Plan) were already raised by Technical Staff and are discussed at length in this report. There is no point in repeating them here.

## 2. Letter of Janice Brose:

The opposition letter from Janise Brose (Exhibit 33) raises concerns about the volume of traffic, dangerous road conditions and frequent flooding of Baltimore Road. The traffic and road condition concerns have been addressed in Part III. H. of this report and the flooding was discussed in the Part III. I. In the Hearing Examiner’s opinion, Applicant’s proposals for dealing with these issues will suffice.

## 3. Letter of Michelle and Donna Wenzel:

The opposition letter from Michelle and Donna Wenzel (Exhibit 38) expresses concern about the possible impact of the proposed development on the ecosystem of the adjacent parkland. Once again, the environmental issues have been dealt with at length in Part III. I. of this report and repetition here would serve no useful purpose. Suffice it to say that, after considering all the evidence, the Hearing Examiner did not find the proposed development to be inappropriate based on its anticipated environmental impact.

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<sup>11</sup> The Rockville letter mentions that the subject site is within an “urban growth area.”

#### **IV. SUMMARY OF HEARING**

##### **A. Applicant's Case in Chief**

###### 1. James Crawford:

James Crawford testified as an expert in zoning and land planning. He stated that the northern boundary of the defined zoning neighborhood is Route 28. The eastern boundary is Bauer Drive, Greenspan Lane, and across Rock Creek Park to Twinbrook Parkway. The southern boundary of the defined zoning neighborhood is Twinbrook Parkway, Baltimore Road, northern boundary of the Rockville Cemetery, and then a line extended up to the intersection of Avery Road and Route 28. He characterized the neighborhood as “a predominantly multifamily townhouse residential community, which includes single family detached residences, extensive park land, public schools, private and public institutional uses, and shopping center.” Tr. 49.

According to Mr. Crawford, the Master Plan designates the property as institutional use to the south, and park addition to the north. It does not recognize the subject property as “a significant parcel.” He believes the reason for that is that the 1964 General Plan indicated a northern portion of this property as public park use, “and apparently the Master Plan simply reiterated the General Plan designation of park use for this property.” Given that the property was designated for park use and the existing institutional use, mainly the synagogue, Mr. Crawford opined that the Technical Staff, in preparing the Master Plan, “apparently assumed that those uses were appropriate and did not really focus on that property for any development use, but simply as a park and existing institution.” Tr. 50-51.

In Mr. Crawford's opinion, the current Technical Staff, in examining the subject application “simply looked at this as a property that had existing residential zoning, and since the Master Plan showed it for nothing really, in the way of development, their position is that the Master Plan zoning should go forward, namely R-90 and R-200.” Tr. 52. The Master Plan map

shows the subject property as public park. Mr. Crawford suggested that because the Master Plan assumed that the subject property would be a public park, it also assumed the underlying zoning was irrelevant with regard to public park use, “so the property was ignored.” Tr. 52-53.

However, Mr. Crawford noted that the Master Plan also indicates that it encourages a wide choice of housing types, appropriate densities and locations, with the objective of maintaining and enhancing the quality of housing in the neighborhoods. Mr. Crawford stated that the proposed development would consist of lower intensity townhouses in an area of low to medium density that takes advantage of the location convenient to schools, parks, and shopping, and thereby enhancing the neighborhood in achieving the Master Plan’s housing goal. Tr. 54.

Mr. Crawford further testified that the purpose of the R-T Zone is to provide suitable sites for townhouses in sections of the County that are designated or appropriate for the development of densities allowed in the R-T Zone. In Mr. Crawford’s opinion, the subject property is appropriate for the R-T Zone because it is located in an area of low to medium density townhouses, multifamily development, institution uses and public uses. Moreover, the density of the property across Baltimore Road, the Ashleigh Woods townhouse community, is seven-and-a-half units to the acre, and the townhouse development to the north, called Rock Creek Townhomes, is also seven-and-a-half units to the acre. The subject property is proposed for townhouse development at 5.3 units to the acre, which is a density slightly lower, but certainly compatible and consistent with existing densities in the area. Tr. 55.

Mr. Crawford testified that the second purpose of the R-T Zone, to provide a buffer, or transition uses, between commercial, industrial, or high density apartment uses and low density one family uses, is an alternative method of satisfying the purpose clause. “I mean, you don’t have to meet both of these purpose clauses.” Tr. 56. Nevertheless, Mr. Crawford felt that the proposed townhouse use would also meet the spirit of the transitional purpose because the institutional uses

of the nearby synagogue, church, schools and County offices “are akin to some commercial uses” in their traffic and intensity, and the town houses would be a buffer between them and the abutting parkland, which is residentially zoned, and residences beyond it. Tr. 57-58. In Mr. Crawford’s opinion, the City of Rockville is constrained by its amended zoning ordinance, which prohibits the use of townhouses adjacent to parks as a transitional use.

Mr. Crawford disagrees with Rockville’s policy of prohibiting townhouses adjacent to parks. In his opinion, locating townhouses adjacent to parks as a transition “makes a lot of sense.” Tr. 59.

Initially, Applicant had planned to build 43 townhouses on the subject site as shown in Exhibit 48, the original schematic development plan. After meeting with Technical Staff on several occasions, the plan was revised to save the large forest area (about 1.5 acres) and specimen trees on the property, as shown in Exhibit 49. Tr. 62. Applicant reduced the number of units to 30 and retained all of this environmentally sensitive area, which can be dedicated to the parkland which it adjoins.

Applicant also moved the storm water management, which had been located in the wooded area, up to near the hilltop, and added a tot lot, landscaping, in the form of evergreen trees along the boundary with Rockville High School and an evergreen screen next to the synagogue. Tr. 63.

Baltimore Road will be widened in accord with the standard for primary streets of Montgomery County DPW&T, 18 feet from center line, with a 5-foot sidewalk, and this will improve the road with regard to safety and also increase the sight distance to the north. The sidewalk will run along the frontage of the subject property, and also along the frontage of the synagogue property, to connect to an existing sidewalk on the Rockville High School property. There is a sidewalk on the other side of the street, which extends all the way up to the shopping center. Tr. 63.

Mr. Crawford further testified that the subject proposal meets all of the development requirements: tract area, density of development, all building set backs, building height, coverage, and green area. For example, the building coverage permitted is 35 percent; the proposed is 13 percent. Green area minimum is 50 percent; the proposed is 68 percent. Two parking spaces are required for each townhouse, while Applicant proposes 2.4. Tr. 65.

Mr. Crawford pointed out that a single family development in the R-200 and R-90 zones requires at least 25 feet of frontage on a public street, while that is not required for the R-T Zone. In Mr. Crawford's opinion, it is a significant advantage with regard to the environmentally sensitive area to go forward with a private street as opposed to a public street. Tr. 66. Mr. Crawford also did a comparison of the environmental impact of developing the subject property with single family detached homes (Exhibit 50) versus townhouses, and concluded that the proposed townhouse development was much more environmentally sensitive. Tr. 67-75.

Mostly, this is the result of the "enormous amount of grading to accommodate this public street" required for the single family-detached zones. According to Mr. Crawford, DPW&T standards require a 2 percent landing grade, starting at the intersection with Baltimore Road. The 2 percent landing grade, according to these DPW&T standards, needs to extend approximately 140 feet. Then, the upper part of the road can reach a maximum of 14 percent grade. This is a very steep site, and it has to be 14 percent grade, but before you can begin grading at 14 percent, DPW&T has a standard for a vertical curve, which extends 220 feet beyond the 140 feet for the landing grade. Referring back to Exhibit 51, that results in a cut of about 36 feet. As stated by Mr. Crawford, it is a massive amount of grading to get down to a point 36 feet lower than it is now, which is required for a public street. Mr. Crawford testified that this additional grading would result in 13,757 additional square feet of land disturbance in the most critical area of this

environmentally sensitive portion of the site. Tr. 72. This area has five specimen trees. In addition to the trees, about a third of an acre would be disturbed.

Mr. Crawford contrasted this result with the grading needed for a private street in the proposed townhouse development. In the case of a private street, you would have a landing grade, but not the 140 feet of the landing grade required for a public street. You would have a small vertical curve, and then the road would be graded up at 15 percent. In doing that, there would be approximately 12 to 14 feet cut, not 36 feet. Thus townhouses would be much more environmentally sensitive to the site than a single-family development.

When questioned about the R-T Zone's Purpose Clause, Mr. Crawford agreed that the Master Plan had not designated the subject property for the R-T Zone, but opined that it was "appropriate" for the Zone and that "a case could be made" that it satisfied the "transition" purpose of the Zone. Tr. 76-77. When pressed, Mr. Crawford stated that it doesn't "specifically" meet the transition purpose, but it does meet the "spirit" of the transition purpose because the institutional uses have characteristics similar to commercial uses.

Mr. Crawford opined that the proposed Zone would be compatible both with the existing uses, including the parkland, and with the proposed uses set forth in the Master Plan. Tr. 78-79. The closest single-family home to the proposed development is 190 feet due north.

[On page 81 of the transcript, in the middle of Mr. Crawford's testimony, the following notation appeared: "Due to equipment malfunction, approximately 5 minutes could not be transcribed." To remedy this gap in the record, the Hearing Examiner directed Applicant's counsel to file an affidavit from Mr. Crawford containing the missing testimony. This was done on January 31, 2005 (Exhibit 65(a)). The record was held open until February 11, 2005, for any public comment

thereon. Having received none, the relevant portion of Mr. Crawford's affidavit is set forth immediately below, *verbatim*, and will be admitted as testimony.]

To the best of my recollection, below is a brief description of what had occurred prior to the equipment malfunction followed by a summary of the missing testimony.

3. Prior to the equipment malfunction noted on page 81 of the transcript, Steve Kaufman asked me whether the proposed zone and development would be compatible with the existing uses and proposed uses set forth in the Master Plan. I answered that the proposed zone and development would be compatible with the townhouse development across the street and surrounding multi-family communities, commercial area, and institutional uses.

4. Thereafter, the Hearing Examiner asked me whether the townhouse use would be compatible with the parkland that surrounds it and what sort of buffer is between the proposed development and the park area to the northwest. I responded that I believe the townhouse use is compatible with parkland and that the northwest area is not likely to be developed with any active recreational uses. I further stated that the northwest area is primarily a passive area and it is not likely people will be there to observe the townhouses; however, during the winter months, one would see the townhouses from the park. I also testified that during the spring and summer months, when the trees and understory foliage are in bloom, unless a person is very close to the edge of the property line, that person would not see the townhouses.

5. Subsequently, Steve Kaufman asked me whether the proposed zoning reclassification to the R-T 8 Zone would be detrimental to the use, peaceful enjoyment, value, or development of surrounding properties or the general neighborhood. I stated that it would not be detrimental and it would not be a problem because of noise, fumes, traffic, or activities on the subject property, and indicated that testimony about traffic would be provided by another expert.

[The following returns to summarizing the transcript of the hearing testimony.]

Mr. Crawford further testified that the proposed development would not be a problem because of noise, fumes, traffic and, in general, would have no adverse effects on the community. The property is served by adequate public facilities, including utilities and schools. Water and sewer services are available to the property, and telephone, electricity and public schools are nearby. According to Mr. Crawford, there is available capacity in high schools, middle schools, and elementary school in the Rockville cluster. Police and fire stations are within reasonable distances to service the proposed community. There are two police stations within two-and-a-half to five miles. There are four fire stations from two-and-a-half to 3.4 miles away. In addition to the high school and the elementary school, both a church and a temple are within walking

distance. Tr. 81-82. In Mr. Crawford's opinion, the proposed development would be a "walkable" community, enabling residents to avoid car trips for a number of services. Tr. 83.

On cross-examination by the People's Counsel, Mr. Crawford testified that the Pickett property is shown as public parkland in the map on page 22 of his Land Use Report (Exhibit 41(b)), and the synagogue property is shown as church and institutional, according to the legend. Tr. 86. The earlier testimony that all of the subject property is recommended for parkland was incorrect, in that only the Pickett portion is so recommended (Tr. 87), or at least a portion of the Synagogue property which is part of the subject site, is listed as institutional. Tr. 94 and Exhibit 54.

Mr. Crawford testified that Ashleigh Woods Townhouses (in the City of Rockville) and the Rock Creek Townhouses (in Montgomery County) were both approved for RT zoning next to parkland. Applicant's counsel agreed to supply other examples of RT zoning being approved next to parkland in Montgomery County.<sup>12</sup> Tr. 88.

Mr. Crawford further testified on cross-examination that the word "designated" in the R-T Zone's purpose clause referred to designation by the Master Plan. Tr. 96. The word "appropriate," in his opinion, applies to the subject application because the property is "located in an area of low to medium density townhouses, multi-family development, institutional uses, public schools, park land, [and] governmental uses, [and] the density in Ashleigh Woods, diagonally across the street from the subject property, is seven and a half units per gross acre. The use is townhouse. It's abutting park land. . . . North of the subject property are the Rock Creek Town homes. Also, it's seven and a half units to the acre. The subject property is proposed for density slightly less than that and it's consistent with the densities of these townhouse projects, and I submit that - that makes the subject suitable for townhouses, at the density proposed." Tr. 97-98.

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<sup>12</sup> See Exhibits 62(c), (d) and (e), subsequently submitted by Applicant.



Finally, Mr. Crawford agreed with the People's Counsel's proposition that since the Purpose Clause of the R-T Zone has not been changed for many years, and since the Rock Creek Townhouses, which abut parkland, were reclassified to the R-T Zone by the County Council, the County Council must have found that the density of townhouses on the Rock Creek Townhouse site was either designated in the Master Plan or appropriately located next to parkland. Tr. 99.

2. Michael Snyder:

Michael Snyder testified as an expert in civil engineering. Tr. 127. His firm prepared the engineering and the land use analysis that was done in this case. He stated that the water and sewer categories, W1 and S1, mean that there is adequate service at this time, as noted in the Technical Staff report. There is an existing 12-inch water line in Baltimore Road which would serve the development. According to Mr. Snyder, the sanitary sewer from the site will be collected in the private streets of the proposed development and piped into an existing 8-inch line that's also in Baltimore Road. That existing line, then, runs in an orderly direction toward the main interceptor that's in Rock Creek. Those are two very large pipelines, which have adequate capacity for both transmission and service for these areas. Tr. 129-130.

Mr. Snyder further testified that there are electric facilities and phone facilities in Baltimore Road, but he is not sure about gas lines. His firm also prepared a formal storm water management concept plan, and submitted that to the Department of Permitting Services (DPS), and received an approval letter for the plan, dated November 12, 2004, signed by Rick Brush (Exhibit 57). Mr. Snyder indicated that, under the plan, storm water from the development portion of the property will be collected in a series of inlets on the upper portion of the site, where the townhouses are proposed and piped to two separate "sanitrappers" to treat the water quality from the runoff. After the water is treated, the runoff will go into an underground storm water facility, which will consist of roughly 300 feet of large metal pipe that's buried underground, to

provide storage for excessive storm water runoff. At the bottom of the hill, at the entrance, there will also be two inlets to collect water that runs downhill. This will, once again, be treated for water quality with a large pre-cast facility, which separates oils and sands and other pollutants. It acts as almost a settling type agent for some of the larger particles and also for the oils that float, and it releases the clean water. This system will tie into an existing storm drain system in Baltimore Road that collects water from the synagogue, and a limited amount of water from the road, and discharges it into an existing channel, which flows into Rock Creek. Tr. 131-133.

According to Mr. Snyder, the planned system, which will now have a series of inlets and pipes, differs from how the property currently drains. Currently, there is no storm drain system in Baltimore Road, and during large storms, “a relatively significant amount of water” runs off the hill, sheets across Baltimore Road, and causes, essentially a hazardous situation, particularly in ice and possibly siltation. There is presently nothing that would intercept the water that's running off from flowing across the street. Mr. Snyder testified that, as part of the development improvements, Applicant will provide another lane of traffic along the frontage of the property. As that is done, Applicant proposes a “closed section road, curb and gutter road,” and to construct that lane so that the water will flow, from the roadway, back into a gutter, and that gutter will intercept the water that's coming off of the silt, which will alleviate, or certainly minimize, any water that runs across the road. Tr. 133-134. In his opinion, both from an operational point of view, for the road, and also from a storm water management safety point of view, what is being proposed will be a better situation than what exists there today. Although the development will increase the imperviousness and will thus create more runoff, Applicant will provide storage in the upper regions of the property to temporarily store that excessive runoff before it comes down the hill. Tr. 134.

Mr. Snyder stated that the current storm water management regulations require Applicant to provide three levels of treatment. One is ground water recharge, the second is water quality,

and the third is what they call channel protection volume. Applicant's proposed storm water concept has been designed to meet those requirements. The system would be sufficient to more than compensate for the added imperviousness. "You will not have as much water run off onto Baltimore Road because . . . all developed portions of the site will flow into the storm drain system. This undeveloped portion, which we're preserving as woodlands, will still flow down the hill, toward Baltimore Road, but the improvements in the roadway will be designed so that we will alleviate any sheet flow across the road." Tr. 135-136.

In Mr. Snyder's opinion, there will be adequate public facilities to serve the development without detrimental impact on the surrounding area, and from an engineering point of view, this development is compatible with the surrounding uses in the area. Tr. 137.

On cross-examination, the People's Counsel asked why, in the third full paragraph of the DPS approval letter (Exhibit 57), the Department of Permitting Services stated, "A more natural design approach to storm water management may have been possible by altering the layout of the site?" Mr. Snyder replied that DPS was making note of the fact that Applicant is providing storage for the channel protection volume in underground pipes, which is somewhat unusual for a residential development. Applicant's plan for an underground pipe system for this purpose is more costly than the traditional ponds (which would have occupied some of the area that is presently forested), but it is being proposed by Applicant in an attempt to preserve as much of the existing woodlands and forest as possible. Tr. 138-139.

### 3. Edward Papazian:

Edward Papazian testified as an expert in transportation engineering. He did a traffic analysis (Exhibit 41(m)) of the proposed 30-unit development and submitted it to Park and Planning's Transportation Staff. This transportation statement demonstrated that the proposed development will result in 14 trips in the morning peak hour, and 25 trips in the evening peak hour,

which, Mr. Papazian noted, is well below the 30-trip minimum that requires a traffic impact study, according to the Planning Board's Local Area Review Transportation Guidelines. In Mr. Papazian's opinion, this small number of trips results in no measurable impact, and satisfies the Planning Board's requirements for Local Area Transportation Review (LATR). Transportation Staff agreed with this conclusion. Tr. 143-144.

Mr. Papazian also looked into the safety situation with regard to Baltimore Road, including the accident history referenced in the Technical Staff report. In his opinion, this proposed development will do a great deal to enhance traffic and pedestrian safety in the area for a number of reasons. For one thing, the Applicant will be upgrading Baltimore Road, along the site frontage, to the County's standards, which will provide for a better cross section for the Baltimore Road. In addition to that, pedestrian access and safety will be significantly enhanced through the construction by Applicant of a 5-foot wide sidewalk, which will provide a continuous pedestrian connection from this property to Rockville High School. Moreover, the Applicant is willing to work with the Staff, with the County, and with the community to install appropriate traffic calming measures. Tr. 145.

According to Mr. Papazian, traffic calming measures for Baltimore Road could include such things as "chokers" that would provide for a little bit of an extension from the sidewalk, to the roadway, to try to calm traffic. It could also involve the installation of some small traffic circles, or a speed limit sign that uses radar to read and display each driver's speed as he/she drives by, forcing the driver to look at his/her speed. All these measures, and others, have been used in Montgomery County, and have been accepted by the Department of Transportation. Tr. 145-146. Mr. Papazian concluded, stating that appropriate steps will be taken at the time a preliminary plan of subdivision to address anything that comes along, but his findings are that there will be no

measurable impact on traffic, and pedestrian and vehicular safety will be enhanced with the proposed development in place. Tr. 146.

The People's Counsel objected to placing the promised traffic calming measures in the binding elements of the schematic development plan (SDP), arguing that such matters should be reserved for subdivision review. Applicant's counsel indicated that he would agree to noting the promised traffic calming measures on the SDP, even if not in the binding elements, as long as they are acceptable to the Montgomery County Department of Transportation. Tr. 148-152.

4. James B. Morris:

James Morris testified as an expert in environmental consulting and ecology, which he defined as "looking at the way that the environmental systems work as a whole." Mr. Morris prepared a forest stand delineation for the subject property, assessing the forestry resources and the other environmental features of the site, looking at steep slopes, soil conditions, wildlife and wetlands.<sup>13</sup> Tr. 157-158. This analysis is a prerequisite at the point of subdivision. Mr. Morris identified a rendered version of the revised NRI/FSD, which was admitted as Exhibit 58.

Mr. Morris described Exhibit 58 as showing "the basic environment setting on the site." The green shading that's predominant is indicative of forest stands on site. The existing dwelling and some clearing associated with that are in the center of the property. The area fronting on the east side of the property, fronting on Baltimore Road, is steeper sloped, has shallow soiled rocky out crops, and a predominance of specimen trees that occur on site. Specimen trees are significant trees. Part of the forest stand delineation process calls for an assessment of the forest stand's conditions. According to Mr. Morris, this site has one type of forest on it, however, the eastern portion of what has been identified as the Pickett property is the "nicer part of the forest," due to

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<sup>13</sup> Mr. Morris was actually referring to the revised Natural Resource Inventory/Forest Stand Delineation (NRI/FSD), Exhibit 41(d).

other environmental features, such as the shallow slopes and the rock outcrops, as well as the density of the specimen trees. Tr. 159-161.

In Mr. Morris's opinion, even though all the woodlands are designated as high priority forest, "it's not an exceptional resource," but it is "a very nice resource," the better portion being on the east, on the Pickett side of the site, as opposed to western portions. Mr. Morris also prepared a revised Preliminary Forest Conservation Plan ( PFCP, Exhibit 41(h)), the rendered version of which was admitted as Exhibit 59. It shows "[w]hat the proposed project is doing in relation to the forest resources on site, and provides a medium for review for staff to determine whether the site is in compliance with the requirements of the Forest Conservation Act." Tr. 162-164.

Mr. Morris opined that the PFCP is in compliance with the statute, and he noted that Technical Staff also so found. If this property were developed in the R-T 8 Zone with this configuration, the PFCP, in his opinion, would meet all of the forest conservation requirements of the County, and a final FCP would be required concurrent with the detailed site plan, at a later point in the process. Tr. 164.

Mr. Morris also did a comparison of the environmental impact of the proposed RT-8 zoning with possible development of the site under the current zone, which calls for detached single-family homes. After he received comments from Technical Staff on the environmental impacts of the proposed development, Mr. Morris prepared a written, point-by-point response, which was admitted as Exhibit 60. Tr. 166.

Reviewing his responses, Mr. Morris stated that, in Item number 1 there was some confusion on the part of Technical Staff as to acreages involved with disturbance, and the portrayal of what percentage of the site was being disturbed. The entire disturbance for the site is

4.32 acres for the proposed townhouse development, and that includes on-site and off-site disturbances, such as clearing for the road and sidewalk.<sup>14</sup>

The second assertion by Technical Staff was that there would be a permanent loss of priority forest. Mr. Morris responded, saying that even the forest designated “priority” was not an “unusually significant resource,” and that more disturbance to that forest area would occur if it were developed as single-family homes under the current residential zone, as the owners have a right to do. Tr. 167-168.

Item 3 raised by Technical Staff was that the planned development would disturb the critical root zone of significant specimen trees located in the adjacent parkland to the northwest of the townhouses. In Mr. Morris’s opinion, after consultation with an arborist, the five trees in question would not necessarily be lost, especially if proper mitigation techniques were used. “There’s every reason to think that all those would survive.” Tr. 168

The fourth issue was that the development would impact the stream/valley buffer. According to Mr. Morris, the only stream/valley buffer that occurs on this site is stretched across Baltimore Road, and water that currently runs down off of the slope doesn’t even enter this stream. He opined that it does not protect the stream resource, “so it’s sort of a functionally dead stream buffer. . .” Moreover, the only impacts that are being proposed result from improvements to Baltimore Road, not from development of the site. Tr. 169.

The fifth concern raised by Technical Staff was impact on patches of exposed red rock. According to Mr. Morris, that is the area Applicant is actively trying to preserve.

The sixth item in question is the possibility of “wind throw” upon remaining trees. Mr. Morris indicated that wind throw occurs when high gusts or strong wind conditions uproot unprotected trees. In his opinion, that concern becomes more relevant in a development “when you create

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<sup>14</sup> Technical Staff had asserted that the area of disturbance would be 5.33 acres.

edge, and there's new potential for stress on one side of an exposed tree, but . . . we've seen nothing that indicates that there's an unusual situation on this site that makes it more or less possible than any other development area where you've cleared forest."

Mr. Morris testified that item 7 concerned a similar point and that he had already addressed item 8 which involved sheets of flowing water. He noted that part of what Applicant is doing will convey all of that water underneath of Baltimore Road. "So, it's going to be removed from the road surface altogether." Tr. 170-171.

Based on his expertise, and taking into account the current facts as they are presented in the revised schematic plans, Mr. Morris testified that this property is suitable for the development from a ecological environmental standpoint, "especially as opposed to the single family use." In his opinion, the Applicant's proposal would have less of an impact on the environment and would not have any particularly adverse effect on the health and environmental situation, or safety, or general well being of the surrounding neighborhood. Tr. 171-172.

#### 5. Edward P. Milhous:

Edward P. Milhous testified as an expert arborist. He analyzed trees identified by Mr. Morris to determine their health and likelihood of surviving the planned project. That analysis is contained in Exhibit 41(p), dated October 14, 2004.

Mr. Milhous testified that an arborist rates individual trees as being desirable or undesirable or marginal, based on their species, the characteristics of the species, and the condition of the individual trees. After that, each tree is rated as to its likelihood of surviving the project as laid out on the plan, and given one of the following ratings: no chance of surviving, or it's chances are poor, or fair, fair/good, or good. Tr. 174-175.

Mr. Milhous further testified that, on this site, there were 33 trees that he looked at, and "of the 33, 25 were desirable or marginal, and . . . of those[,] 18 had fair/good chance to a good



chance of surviving the construction process.” He also opined that the chance of surviving might be improved at the site plan stage through various agricultural techniques. In Mr. Milhous’s opinion, “the townhouse development is certainly superior to the single family residential development plan” from the perspective of preserving trees. Tr. 176. Several additional trees would be lost if the property were developed as single family homes. “You would lose four or five additional trees.” Exhibit 51 shows the additional trees that would be lost as “x’d out.” The tan, yellow pan area is the additional grading area that would occur if you developed it as a single family residential with five units. Tr. 177. Mr. Milhous explained that of the four or five trees near the northwest border of the site, only one of them will have a grading anywhere close to it, and that tree is going to lose less than 25 percent of its root system. In his opinion, Maryland is extra conservative on their designation of what is a critical root zone. There are also special measures that can be taken during grading and construction, to protect trees that are somewhat impacted. “You can apply compost to root systems. You can root prune the root systems to avoid excessive damage. You can mulch the trees. There are various things that can be done.”<sup>15</sup> Tr. 178-179.

Mr. Milhous also explained that “wind throw” depends on many factors, including weakening of the root systems and removal of nearby trees which tend to support each other; however, it is very difficult to predict. Tr. 180-182. In his opinion, “If the site is to be developed, the townhouse scenario is certainly superior to the single family residential as far as tree preservation goes.” Tr. 183.

#### 6. Michael Pickett:

Michael Pickett testified that he was raised on the subject property, and his family used to own the property now owned by the synagogue, as well. Not long after they sold part of the

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<sup>15</sup> Applicant put a note on its revised SDP (Exhibit 69(b)), promising to implement these mitigation measures, as described in Exhibit 41(p).

property to the synagogue, the County approached with a desire to have the remaining part that his family owned as part of the parkland. According to Mr. Pickett, the County did not make a reasonable offer, and the family ignored it. Twenty years passed without further offers from the County. Mr. Pickett testified that, in the 1980's, he spoke to Mr. William Griesse in the Park and Planning Commission's land acquisition office, which generated several offers, "none of which are realistic, even in the current [*i.e.*, single family] zoning." Tr. 185-187.

The County has never threatened the use of eminent domain. Over the years, several different developers presented their ideas to the Park and Planning Commission, but they were discouraged. Tr. 187-188. Mr. Pickett also mentioned that, as owners of the subject property, they have a dilemma in that they have no access to their property, and therefore need to build a road. He believes that the road he would have to build would "have more impact on the environment . . . than the proposal that the Oxbridge Group has." Tr. 193-194.

Mr. Pickett testified that the property would have to be sold, and a road built. He believes "the Oxbridge Group's proposal is a win-win situation. My family and I will receive a reasonable value for the property, which I would repeat, the County has not offered. The County will get a critical portion of the property for the County park, at no cost. There will be additional housing and several families will have a home to live in this wonderful area that we all grew up in." Tr. 194. He has been impressed with the Oxbridge Group's plan, and how sensitive they are to blending all of these issues.

Mr. Pickett indicated that he has a contract for the sale of the subject property to the Oxbridge Group, contingent upon the re-zoning to the R-T Zone. Tr. 195.

#### 7. Elliott Totah:

Elliott Totah testified that he is the Executive Vice President of Oxbridge Development, LC, which is the managing entity of Oxbridge Development at Rock Creek, LC, the Applicant,

and that his company is involved in land development activities throughout the Washington Metropolitan area. The Oxbridge Group was founded in 1998, so that his company has been involved in this area for six years. A number of company officials have many years of experience with Montgomery County. Tr. 196-197.

Mr. Totah stated that he has been involved in this application since “day one.” It was put together and submitted on behalf of Oxbridge, under his supervision. He was struck by the environmental characteristics of the site, and has attempted to “work with the general environmental character of the property.” For many reasons, including more flexible development standards and the nature of development in the surrounding area, he concluded that a townhouse development would be appropriate. Tr. 198. Oxbridge's Development at Rock Creek, LC, is the contract purchaser of all of the land that is the subject of this application. Tr. 211.

Applicant originally submitted a plan for 43 units. After several meetings with Park and Planning staff, Applicant submitted a plan showing 34 units. When Park and Planning staff continued to raise significant concerns, Applicant reduced the proposal to the current 30-unit plan, but Technical Staff continued to recommend denial of the plan. Mr. Totah testified that he met with adjacent property owners, including the Tikvat Israel Synagogue and the Ashleigh Woods community, and has agreed to satisfy Ashleigh Woods' safety concern by installing whatever traffic calming measures were deemed appropriate in Baltimore Road. Tr. 199-200.

Mr. Totah anticipates it taking at least a year, after re-zoning approval, to file all the necessary plans, and it may take 12 and 15 months, and possibly up to 18 months to do so. Therefore, he would foresee development of the site to commence approximately 18 to 24 months after approval of the re-zoning. He believes that once development is started, the project would be “sold throughout the site” in approximately 18 months. Mr. Totah testified that he will comply

with the binding elements on the SDP and supply any Moderately Priced Dwelling Units (MPDU's) required by statute. Tr. 201-202.

Mr. Totah agreed, that if the Council grants this re-zoning application, he and his company are prepared to operate in accordance with the binding elements, and with all the applicable regulatory requirements of the County. Tr. 211.

### **B. Testimony on Behalf of Adjacent Property Owner**

#### 1. Betty Jean Fishman:

Betty Jean Fishman testified as the official representative of Tikvat Israel Synagogue, which owns a portion of the property comprising the subject site. She is currently a member of the synagogue's Board of Directors and a member of the land sale planning review committee which coordinated with Applicant on this project. The synagogue's Board of Directors and its Congregation approved sale of a portion of the synagogue's land to Applicant in August 2003. The contract was signed in November of 2003. One provision of the contract was that there should be a review committee, on which Ms. Fishman serves, to monitor the re-zoning plans and any design issues that came up. The synagogue retained counsel, Robert G. Brewer, Esquire, and a land planning specialist, Al Bloomberg, and ultimately approved the plans that were filed by the Oxbridge company in January of 2004. Tr. 103-106.

The synagogue decided to sell a portion of its land to Oxbridge because the land in question was not usable for building on or for parking due to the topography. Security for the synagogue was another motivating factor, especially regarding the possibility of terrorism. A professional security audit in early 2002 concluded that the wooded area behind the synagogue was a source of potentially serious concern. "With a townhouse community in place instead of our undeveloped wooded area, we felt there would be residents serving as our eyes and ears, looking out for the safety of the neighborhood as a whole, and that would improve the security of

our facility. We were also glad that [Oxbridge] planned to preserve a great deal of the wooded area, the trees and the landscaping would make it a very attractive area to have surrounding the synagogue.” Tr. 107.

According to Ms. Fishman, the synagogue also welcomed the proposal because it could provide housing for potential members of the congregation. “There are also congregants who prefer to walk, for whom this would be ideal, should they chose to relocate into this development, and there are other members who might just like to be closer to the synagogue.”

Finally, the synagogue appreciated getting some financial value out of the land which was otherwise unusable. The sale of the land is contingent upon approval of the rezoning request. Tr. 108. Ms. Fishman also introduced a November 17, 2004 letter from the President of Tikvat Israel Synagogue (Exhibit 55) expressing support for the subject application for the reasons stated in Ms. Fishman’s testimony. Tr. 109. In questioning by the Hearing Examiner, Ms. Fishman stated that townhouses might be preferable to single-family detached units because “[f]rom what I’ve heard here today, it sounds as if the townhouse development would preserve a lot more of the park like atmosphere.” Tr. 111. From a security standpoint, “either of them would probably serve as long as there were people around.”

2. Alfred S. Blumberg:

Alfred Blumberg testified as an expert in zoning and land planning. He was retained by Tikvat Israel Synagogue in September of 2003 “to work with the committee in the review of the plans by Oxbridge development, to watch out for their best interests and make sure that the plan that was being proposed was compatible and appropriate, given the existing facilities and land uses at the synagogue.” Tr. 115.

In Mr. Blumberg’s opinion, the application would meet the purposes of the R-T Zone because it is “appropriate for residential development at densities allowed in the R-T Zone,”

based upon the surrounding land uses. “I looked at the high school . . . , the townhouses immediately across . . . Baltimore Road from the property, the adjoining park, and other institutional uses that had been referenced and identified previously . . . [and] within the context of that overall surrounding land use, . . . my opinion is that this is an appropriate location for townhouses, and the fact that it is contiguous to the park, I think is also part of that because it's to the advantage of the County and the residents to provide housing opportunities in close proximity to the parks.” Tr. 116-117.

Mr. Blumberg further opined that there is a relationship there between the park properties, which are publicly owned, and residential development. “The fact that you can see the proposed development from the park, I don't think is antithetical to the use of the park, in fact, it's a public park, it's supposed to be used by people, and so both the fact that we're next to the park and that we're providing a housing resource in this area of the County, I think, helps to buttress my position and my opinion that this is an appropriate location for townhouses within the context of this neighborhood.” Tr. 117.

Mr. Blumberg testified that he had been involved with zoning cases along Seven Locks Road, which also have steep access driveways from Seven Locks, and which also butt up to parkland (in that case, Cabin John Regional Park). He stated that with regard to topography and being contiguous to a park, the two local map amendment applications are quite similar.

Mr. Blumberg noted that, on page 8 of the Technical Staff Report in the present case, Technical Staff agreed that the proposed development may be compatible in terms of uses and densities, with nearby townhouse developments. He concluded that Technical Staff “found some environmental issues that concerned them,” but as far as the compatibility of the uses, “they did find it to be appropriate and compatible.” In Mr. Blumberg's opinion, because this is a floating zone case, compatibility “is a primary issue.” Tr. 120-121.

Mr. Blumberg did not feel that the subject application met the “transition” criterion of the R-T Zone’s Purpose Clause. Tr. 122-123. He also interpreted the word “designated” in the Purpose Clause to mean designated by the Master Plan. Thus, Mr. Blumberg based his conclusion that the proposed development satisfied the R-T Zone’s Purpose Clause solely on the “appropriate” language in the clause. Tr. 123.

### **C. M-NCPPC Technical Staff Witness**

Three members of the M-NCPPC Technical Staff, Kathleen A. Reilly, Khalid Afzal and Michael Zamore, appeared at the hearing at the Hearing Examiner’s request, and were made available to all parties to be called as witnesses. Tr. 35. The only one asked to testify, Kathleen A. Reilly, was called and questioned by the Hearing Examiner.

Kathleen Reilly was called by the Hearing Examiner as an expert witness in zoning and land planning. Ms. Reilly testified that Technical Staff reviewed the application “for meeting the purpose clause under the zone that was required . . . the community planning aspects of it and the Master Plan recommendations, as well as environmental and transportation.” Ultimately, Technical Staff recommended against approval of the application for a number of reasons, but mostly because, in Staff’s opinion, the application did not satisfy the purpose clause of the R-T 8 Zone. Tr. 29.

Ms. Reilly further testified that the proposed use “did not provide the need for buffer or transitional uses between commercial industrial or high in density apartment uses and low density one family uses.” She explained that the surrounding area contained parkland to the north, townhouses across and east of Baltimore Road, which were in the City of Rockville, the adjacent synagogue use to the south, and townhouses as well as other single-family detached, but Staff

“felt that [the proposed townhouses] didn't provide a more effective buffer or transitional use [than] the present zones of R-90 or R-200 would be.” Tr. 29.

Ms. Reilly also stated that the Master Plan did not designate this property for RT zoning. According to Ms. Reilly, the Master Plan designated this property to be developed as either R-90 or R-200, and “staff stood by the Master Plan recommendation.”

The Hearing Examiner noted that the R-T Zone’s Purpose Clause offered alternatives, indicating that the Zone could either be “designated” by the Master Plan or be “appropriate” for the townhouse density. When asked whether she felt that the site was not appropriate for this zoning, in addition to it not being designated as such, Ms. Reilly replied that the densities that were provided were deemed unsuitable based on the environmental impact. She felt that the compatibility issue was less relevant “because the surrounding area doesn't have a clear pattern of uses or development.” Tr. 30.

Ms. Reilly further testified that the townhouse development across Baltimore Road referenced by Applicant’s attorney is within the City of Rockville, and that Rockville sent a letter indicating that municipality’s position that the development of this property was not appropriate for the overall development in this site. Tr. 31. She also mentioned a memorandum of understanding among Rockville, Montgomery County and Gaithersburg that they will work together on any properties that border their area, in terms of getting compatible and acceptable development. When the townhouses across the street were approved by the City of Rockville, they were allowed as a buffer between park land. Since that time, the City has revised their zoning ordinance, and they do not feel that townhouses serve an appropriate use as a buffer between park land. The submissions from Rockville are attached to the Technical Staff report.

Ms Reilly stated that the Master Plan did not provide specific guidance or comments for the subject area, but it did stress environmental protection and suitable density. According to Ms.



Reilly, the Master Plan also recognizes “environmental and physical conditions are major constraints in determining the development potential of this site.” Tr. 32-33. The Master Plan recommends retention and reconfirmation of the existing zone for all developed and underdeveloped parcels in the Aspen Hill planning area, except for those sites that were recommended for a change by this plan. This site was not recommended for a change by the plan. Tr. 33.

Ms. Reilly also expressed concerns about the effect of grading on the environment. By Technical Staff’s estimate, a large percentage of the property being rezoned would be graded. There are a lot of significant and specimen trees in the front and in the rear of the property, but more importantly, there are shallow soils in front of the property. Technical Staff believed that even though the Schematic Development Plan “met the threshold,” more grading would exist at a later date if this case were approved, and that some of the environmental constraints would be more impacted and that more trees would be lost at a later date.

Ms. Reilly concluded by stating that the recommendation of disapproval was based on the problem with meeting the Zone’s purpose clause, although environmental and traffic factors “we felt could not be [found to be] conclusively acceptable at this time to recommend approval.” Tr. 34.

None of the parties elected to cross-examine Ms. Reilly or to pose any questions to the other Technical Staff Planners present at the hearing at the request of the Hearing Examiner.

#### **D. People’s Counsel**

Martin Klauber, the People’s Counsel, did not call any witnesses, but he was a major participant in the hearing. He took a strong position on the central issue in the case — whether the Application satisfies the R-T Zone’s Purpose Clause. Mr. Klauber cited the cases of *Huff v. Board of Zoning Appeals of Baltimore County*, 214 Md. 48, 133 A.2d 83 (1957), *Costello v. Sieling*, 223 Md. 24, 161 A.2d 824 (1960), *Bujno v. Montgomery County Council*, 243 Md. 110,

220 A.2d 126 (1966) and *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), for the proposition that the express terms of the Zone's Purpose Clause control.

People's Counsel argued forcefully that this application satisfies the Purpose Clause because the subject site is "appropriate for residential development at densities allowed in the R-T Zones," which is one of the three alternative statutory criteria in the Purpose Clause. In Mr. Klauber's opinion, one need not consider whether it also satisfies the "transition" criterion (*i.e.*, whether "there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.") Tr. 214-218. The People's Counsel also argued that it was irrelevant that there might be an even higher and better use for the property than that proposed by Applicant. Tr. 218-219. As stated by Mr. Klauber:

The basic question of this zoning case, like all zoning cases before the County Council is not what the best and highest use of a property is . . . The basic question in this zoning case, as in all zoning cases, is whether this application satisfies the requirements of the zoning ordinance. The R-T Zone could be the second best zone, but that's the one here today. That's the one that the burden of proof is based upon. Not whether it's better than the R-200 zone or worse.

Rather than comparing the benefits of the two zones, Mr. Klauber urges that "the R-T 8 Zone, under the schematic development plan, affords a type of development that is in the public interest," because it provides certain benefits to an "environmentally sensitive site." The People's Counsel concluded, "I do support the granting of this application under the first clause of the purpose clause of the R-T Zone . . . ." Tr. 219.

## **V. ZONING ISSUES**

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set

boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed location satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest. *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967).

Montgomery County has many floating zones, including the R-T Zones. The R-T 8 Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a re-zoning.

When the reclassification sought by an applicant is recommended by the applicable Master Plan, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Master Plan does not recommend the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval, unless the Planning Board has recommended approval. Zoning Ordinance §59-H-8.2(b). As mentioned earlier, the *1994 Aspen Hill Master Plan* does not recommend the R-T Zone for the subject site, and the Planning Board made no recommendation in this case because its vote was split two to two.

Thus, an affirmative vote of 6 Council members would be required to approve the subject application. As discussed in Part III.F. of this report, compliance with Master Plan recommendations is not mandatory in this case because the R-T Zone does not require it; rather, the courts have held

that the Master Plan should be treated only as a guide in rezoning cases like this one. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997).

In order to determine whether or not that guidance should be followed in this case, we return now to the three areas of Council review discussed above, the purpose clause of the zone, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

#### **A. The Purpose Clause**

The intent and purpose of the R-T Zone as stated in Code §59-C-1.721 is set forth below.

*The purpose of the R-T Zone is to provide suitable sites for townhouses:*

- (a) In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

*It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.*

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3)

where there is a need for buffer or transitional uses. The relevant Master Plan did not specifically designate the subject site for the R-T Zone; nor is the subject site in a location where there is a need to buffer between commercial, industrial or high-density apartments and single-family homes. Thus, the Technical Staff correctly rejected the notion that the Purpose Clause could be satisfied under those two criteria.<sup>16</sup>

However, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones.*” People’s Counsel argued forcefully that this application satisfies the Purpose Clause under the “appropriate” criterion, and that one need not consider whether it also satisfies the “transition” criterion. Tr. 214-218. In other words, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. People’s Counsel also observed that it was irrelevant whether there might be an even higher and better use for the property than that proposed by Applicant. Tr. 218-219. As stated by Mr. Klauber:

The basic question of this zoning case, like all zoning cases before the County Council is not what the best and highest use of a property is . . . The basic question in this zoning case, as in all zoning cases, is whether this application satisfies the requirements of the zoning ordinance. The R-T Zone could be the second best zone, but that's the one here today. That's the one that the burden of proof is based upon. Not whether it's better than the R-200 zone or worse.

Clearly, the People’s Counsel is correct in observing that we must consider the application before us, not some other possible project that might have been more perfect. The Hearing Examiner also agrees that only one of the three possible alternative criteria in the Purpose Clause need be satisfied, given the use of the word “or,” not “and,” in the statute. Thus, we must now determine whether the evidence establishes that the subject site “is appropriate for residential development at densities allowed in the R-T Zones.”

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<sup>16</sup> The opposition from the City of Rockville is also based on the assertion that the townhouse use would not be considered “transitional” under its current code. Of course, prior to amending its zoning code, the City of Rockville approved the Ashleigh Woods townhouse development directly across Baltimore Road from the subject site.

Evidence supporting Applicant's contention that the subject site satisfies the "appropriate" criterion includes the following facts: the Master Plan encourages a wide choice of housing types, with the objective of maintaining and enhancing the quality of housing in the neighborhoods; the proposed townhouses would not be located adjacent to single family detached homes, but rather next to an institutional use, a synagogue, which supports the application; the subject site is located in an area of low to medium density townhouses, multifamily development, institutional uses and public uses; the density of the property across Baltimore Road, the Ashleigh Woods townhouse community, is seven-and-a-half units to the acre, and the townhouse development to the north, Rock Creek Manor Townhomes, is zoned at twelve-and-a-half units to the acre; the subject property is proposed for townhouse development at a density of 5.3 units to the acre, which is lower than, but compatible and consistent with, existing densities in the area; the proposed townhouses would be convenient to a synagogue, schools, parks, churches, other townhouses and shopping, thereby creating a "walkable" community and enhancing the neighborhood; and the proposed development would not be a problem because of noise, fumes, excessive traffic or other adverse effects on the community.

The Hearing Examiner can conceive of no reason why it would be inappropriate to locate these townhouses next to a synagogue, and near churches, schools and other townhouses. Even Technical Staff concedes that the proposed townhouses would be compatible with the neighboring developments. "It appears that the proposed development may be compatible in terms of uses and density with the nearby townhouse developments." Technical Staff report, page 8.

However, one must also consider the fact that the proposed townhouses would be located adjacent to parkland. As to whether townhouses at the proposed density can be appropriately located abutting parkland, we look to developments approved in the past by the Montgomery County Council and the question of environmental impact. Most convincing is the fact that the

Montgomery County Council has repeatedly approved the R-T Zone as appropriate next to parkland, even where the applicable master plan has not designated the R-T Zone.

Three Council Resolutions reclassifying properties located adjacent to parkland from the R-90 or R-200 zones to the R-T Zone were submitted into evidence in this case (Exhibit 62):<sup>17</sup>

1. Resolution No. 9-1851, adopted on June 15, 1982, granted the reclassification of approximately 3.0290 acres of land located adjacent to the Cabin John Regional Park from the R-90 Zone to the RT-6 Zone. The topography of that property, like the subject property, included steep slopes (up to 30%). The Council recognized that “though not in strict accordance with the R-90 zoning recommended for the subject property in the Potomac Subregion Master Plan, the requested reclassification is in accordance with the Master Plan’s recommendation of single-family use for the subject property and the requested reclassification would achieve the Master Plan’s objective of providing for an ecologically sensitive development of a property in order to protect the immediately abutting steep slopes of the Cabin John Regional Park...”
2. Resolution No. 8-1500, adopted on August 23, 1977, granted the reclassification of approximately 6.5102 acres of land located adjacent to the Rock Creek Park from the R-200 Zone to the R-T Zone. This property is located north of the subject property along Baltimore Road, and was identified during the public hearing, and on page 8 of the Technical Staff report, as the Rock Creek Manor townhouses. See Defined Neighborhood Map on Page 9 of this report. Although the Master Plan recommended the R-30 Zone for the property, the Council found that the site was “both designated and appropriate for multi-family residential development at densities of 12.5 units or more per acre.” The Council also determined that the reclassification of the property to the R-T Zone “will not adversely affect the implementation of the Master Plan for Aspen Hill and Vicinity even though the zone requested is not in conformance with the specific zoning classification recommended by that Plan.” In addition, the Council stated that the property’s location across from land developed with commercial and multi-family uses “as well as its location adjacent to Rock Creek Park and Maryland Route No. 28 and Old Baltimore Road make this location appropriate for the densities permitted by the RT zoning classification.” The Council also found that the development of the property in accordance with the R-T Zone “would provide a form of development which would be compatible with existing and planned land uses in the surrounding area.”
3. Resolution No. 5-2137, adopted on September 21, 1965, granted the reclassification of approximately 8.4420 acres of land located adjacent to the Cabin John Regional Park from the R-90 Zone to the R-T Zone.<sup>18</sup> This property

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<sup>17</sup> Applicant’s summaries of these Resolutions are paraphrased herein.

<sup>18</sup> Because the Council Resolution did not provide a detailed description of the surrounding area, including the location of the property adjacent to parkland, Applicant attached a copy of the Technical Staff Report in the 1965 case to Exhibit 62 in our case, and that report provides such a description.

had steep slopes, and there was evidence at the hearing that the property was not suitable for single-family development and that it would be a major engineering problem to develop an access road to the property that would meet County requirements due to the topography. Both Technical Staff and the Planning Board disagreed, recommending against the rezoning to the R-T Zone, in favor of detached, single-family development. In Resolution No. 5-2137, the Council stated that “[t]he R-T Zone was adopted to provide a reasonable use for small tracts of land that have unusual topographic features such as the subject property” and that “the R-T Zone for this piece of property will be wholly compatible with the existing uses in the area and those that are recommended by the Master Plan.” The Council observed that “the adopted Master Plan recommended no R-T zoning in the area since the R-T zone was not adopted at that time.”

These three Council resolutions provide convincing evidence that locating a townhouse development next to parkland is not, *per se*, inappropriate. It should be noted that one of the townhouse developments approved by the Council next to parkland (paragraph numbered 2, above) is the Rock Creek Manor Townhouse development, directly across Rock Creek Park from the subject site. This is not to say that these past approvals mandate the same action in this case, because the location of each parcel of land is obviously different, thereby bringing other factors to bear. Moreover, the Council’s view of what is “appropriate” could change over the years as the nature of the community changes. Yet, it is the best indicator available of what the Council considers “appropriate,” and clearly it has not ruled out RT-8 development abutting parkland. If there are other Council Resolutions finding it inappropriate, they were not submitted as evidence in this case. Considering all these factors, the Hearing Examiner concludes that the proposed development does meet the “appropriate” criterion in the R-T 8 Zone’s Purpose Clause, as long as it does not unduly impact on the environment.

Technical Staff argues that a townhouse development at the proposed density will not be friendly to the environment; however, Applicant presented a great deal of evidence to refute this contention, which was discussed in Part III. I. of this report (pages 28-37). As stated there, based on the evidence of record, the Hearing Examiner finds that the proposed townhouse development



would be less intrusive on the environment than the single-family detached development illustrated at the hearing. Moreover, even without reference to the comparison generated by Applicant, the Hearing Examiner must take into consideration that the site is not located in a Special Protection Area, that there are no wetlands on the property, that the storm water management concept plan was approved by the Department of Permitting Services (DPS) and that, by Technical Staff's own admission, "[t]he proposed development meets the technical requirements of the Forest Conservation Law." Technical Staff report (Exhibit 43), at page 10. Considering all the evidence, including these factors and the responses of Applicant's experts to the concerns raised by Technical Staff, the Hearing Examiner cannot find the proposed development to be inappropriate based on its environmental impact.

This is a close case, which could be justifiably decided either way. Technical Staff recommended against the proposed rezoning, and the Planning Board split two to two, yielding no recommendation. However, based on the preponderance of the evidence, including evidence submitted at the hearing subsequent to the Technical Staff's recommendation, the Hearing Examiner has reached the conclusion that the rezoning application should be granted. We must bear in mind that the choice is not between development and no development. The Master Plan recommends classifying the subject site as part Institutional and part Parkland, but the County has not acquired any of it for parkland, and the owners have the right to develop the land under the current zone for single family detached homes. If the owners of the land in question are restricted to developing the land with single family detached homes in accordance with the Zoning Ordinance, the impact on the environment may well be worse than the present plan. That is what the evidence shows. Moreover, under the Applicant's proposal, a significant portion of the land will be dedicated to parkland, or put in a conservation easement, at the Planning Board's discretion. This outcome is assured by a binding element on the SDP.

Since the Master Plan does not designate the subject site for the R-T Zone and the nature of the surrounding properties does not allow this project to meet the precise statutory language for a transition from commercial or industrial uses, this case turns on whether the proposed development is “appropriate” for development at densities allowed in the R-T Zones. The Technical Staff says “no,” based on its environmental concerns, but the weight of the evidence demonstrates that development at a lower density would, paradoxically, have a greater potential for harming the environment due to the additional grading that would be required.

Moreover, it was clear from the testimony of Kathleen A. Reilly, who wrote the Technical Staff report, that her negative recommendation was based mostly on Technical Staff’s conclusion that the proposed development could not be considered transitional. Tr. 29-30. After all, Technical Staff approved Applicant’s revised Preliminary Forest Conservation Plan ( PFCP, Exhibit 41(h)) and conceded that the proposed development was compatible with the surrounding uses (except, perhaps, the parkland). Most significantly, Technical Staff’s final communication to the Hearing Examiner in this case (Exhibit 66), concludes with the observation that

the applicant could develop the subject property under the existing R-90 and R-200 zones utilizing the R-90 cluster standards. **A development under the cluster standards could possibly yield all townhouses.** Alternatively, the applicant could develop both parcels under the existing zoning and Moderately Priced Dwelling Unit options of the Ordinance. **Under the MPDU option,** approximately 40% to 50% of the proposed units could be townhouses or **all the proposed units could be townhouses if it can be demonstrated to the Planning Board that the proposed development is more desirable from an environmental perspective.** [Emphasis supplied]

It is evident from this letter that Technical Staff does not actually believe that an “all townhouse” development at this location is, *per se*, inappropriate, for they have suggested two alternative zoning scenarios which could yield “all townhouses” on the subject site. If townhouses would not be inappropriate next to parkland in the existing R-90 and R-200 zones, then they would not be inappropriate in the R-T 8 Zone, just because they are next to parkland. If Technical Staff’s

objection is to the proposed density of the development, then some adjustment of the density is possible at site plan because, in its final revised SDP (Exhibit 69(b)), the Applicant changed its density binding element from the specification of an absolute figure of 30 townhouses to a more flexible “maximum” of 30 townhouses.

Accordingly, the Hearing Examiner concludes that the proposed rezoning and development would be consistent with the Purpose Clause of the R-T Zone.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. Technical Staff observed that “[t]he compatibility issue is less relevant for the subject application as the surrounding area does not have a clear pattern of certain uses or types of development. The subject site is surrounded by parkland, a high school, a synagogue and townhouses.” Exhibit 43 at page 8. Even though Technical Staff has reservations about the possible environmental impact of the proposed development, it concedes that “the proposed development may be compatible in terms of uses and density with nearby townhouse developments.” Exhibit 43 at page 8.

The Applicant’s expert land planner, James Crawford, testified that, in his opinion, the proposed Zone would be compatible both with the existing uses, including the parkland, and with the proposed uses set forth in the Master Plan. Tr. 78-79. Applicant’s civil engineer, Michael Snyder, testified that from an engineering point of view, this development is compatible with the surrounding uses in the area. Tr. 137. Alfred S. Blumberg, the expert land planner employed by the neighboring synagogue, testified that because this is a floating zone case, compatibility “is a primary issue.” Tr. 120-121. He agreed with Technical Staff’s conclusion that a townhouse development at the subject site would be compatible with surrounding uses. In his opinion, that compatibility extends to having townhouses located adjacent to parkland, which he felt was quite appropriate. Tr. 117.

For the reasons discussed above and in the previous section, the Hearing Examiner agrees with the findings made by the Technical Staff that the proposed development would be compatible with surrounding uses. Based on previous Council resolutions approving townhouses next to parkland and on Mr. Blumberg's testimony, the Hearing Examiner also finds that the proposed townhouse community would be compatible with the adjacent parkland. Thus, reclassification to the R-T 8 Zone and the development proposed would be compatible with existing and proposed development in the surrounding area.

### **C. Public Interest**

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

*“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”*  
[Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. The Land Use Plan from the applicable Master Plan lists most of the subject site as parkland, not developable property. Since M-NCPPC has failed to acquire it as parkland and since the owner of the Pickett property has the right to develop it in its current single-family detached zone in a way might be less desirable from an environmental standpoint, the Master Plan's reference to using it as parkland is not a reliable indication of the public interest in this case.

The Planning Board could not reach a majority position in this case, and Technical Staff recommended against approval for reasons which have already been discussed at great length, but which are overcome by the weight of the evidence in this case.

The impact on public facilities has been discussed in Part. III. H. of this report. The evidence indicates that the 30 dwelling units proposed here are expected to generate only 4 high school students, 3 middle school students and 6 elementary school students. Montgomery County Public Schools indicates that enrollment in the Rockville school cluster will be within capacity for the entire forecast period, and that the current AGP schools test also finds capacity adequate in the cluster.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and would be ameliorated by the traffic calming and safety measures sought by Applicant and the neighbors. No evidence was presented to suggest that the proposed development would have any adverse effect on utilities or other public services.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities and that approval of the requested zoning reclassification would be in the public interest.

## **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application satisfies the requirements of the purpose clause;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area; and

3. The requested reclassification to the R-T 8 Zone bears sufficient relationship to the public interest to justify its approval.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-822, requesting reclassification from the R-90 and R-200 Zones to the R-T 8 Zone of 5.6872 acres of land, known as Parcel N895 and a portion of parcel N951 and located in the 4<sup>th</sup> Election District on the west side of Baltimore Road, approximately 1,850 feet south of its intersection with Parkvale Road and 1,300 feet north of Twinbrook Parkway, in Aspen Hill, adjoining the City of Rockville corporate limits, be **approved** in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 69(b); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

Dated: March 15, 2005

Respectfully submitted,

Martin L. Grossman  
Hearing Examiner